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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE MORTGAGE COMPANY,
Petitioner,

v.

JIMMY E. WOOD,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

WYCK A. KNOX, JR.
Counsel of Record

JENNIFER E. HASSEL
TED H. CLARKSON
KNOX & ZACKS, P.C.
Post Office Box 2043
Augusta, Georgia 30903
(404) 724-2622

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

The United States Congress enacted 12 U.S.C.A. §1735f-7 (West 1980) to preempt restrictive state usury limits for FHA/VA home loans. Subsection (b) of this law gives states the ability to decline, or override, this federal preemption by changing their usury limits. The question presented is whether subsection (b) requires the legislation amending state usury limits to expressly refer to FHA/VA loans in order to effect an override of the FHA/VA preemption.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT[1]

1. Jimmy E. Wood and the members of the class certified by the United States District Court, Southern District of Georgia.
2. Fort Wayne Mortgage Company, a Michigan corporation and a wholly owned subsidiary of Colwell Mortgage Corporation, a Texas corporation.
3. Richard Doyle and the members of the class certified by the United States District Court, Southern District of Georgia.
4. Southern Guaranty Corporation, a Florida corporation.

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[1] The Government National Mortgage Association is a real party in interest in that it holds assignments to nearly all of the loans in the plaintiff class.

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OFFICIAL REPORTS OF OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Eleventh Circuit, reported under the name *Doyle v. Southern Guaranty Corp.*, is found at 795 F.2d 907 (11th Cir. 1986). The second and final opinion of the Eleventh Circuit was issued on June 5, 1987 and has yet to be reported in any official or unofficial reporter. The opinion of the Supreme Court of Georgia on the certified question is reported in *Southern Guaranty Corp. v. Doyle*, 256 Ga. 790, 353 S.E.2d 510 (1987). The order of the United States District Court for the Southern District of Georgia denying Petitioner's motion to dismiss and motion for summary judgment is also unreported.

Copies of all four of the above opinions and orders are included in the Appendix to this Petition.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered on June 5, 1987 by the United States Court of Appeals for the Eleventh Circuit.

The within Petition for Writ of Certiorari is presented within ninety (90) days pursuant to 28 U.S.C.A. §2101(c) (West 1982), and this Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1) (West 1966).

STATUTES AND REGULATIONS INVOLVED

1. The FHA preemption statute enacted as §308 of the Housing and Community Development Amendments of 1979, Pub.L. No. 96-153, title III, §308, 93 Stat. 1113-14, (codified at 12 U.S.C.A. §1735f-7 (West 1980)):

> (a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received or reserved shall not apply to any loan, mortgage, or advance which is insured under subchapter I or II of this chapter.
>
> (b) The provisions of subsection (a) of this section shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance.

2. The VA preemption statute enacted as §401 of the Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, Pub.L. No. 96-128, title IV, §401, 93 Stat. 982, 986-87 (codified at 38 U.S.C.A. §1828 (West Supp. 1987)):

> If, under any law of the United States, loans and mortgages insured under title I or title II of the National Housing Act are exempt from the application of the provisions of any State constitution or law (1) limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders, (2) restricting the manner of calculating

such interest (including prohibition of the charging of interest on interest), or (3) requiring a minimum amortization of principal, then loans guaranteed or insured under this chapter are also exempt from the application of such provisions.

3. The 1980 Amendments to Georgia's Motor Vehicle Sales Finance Act, Motor Vehicle Sales Finance Act Amended, 1980 Ga.L. 523 (codified at O.C.G.A. §10-1-33 (1982)), in pertinent part:

> Section 1. An Act known as the "Motor Vehicle Sales Finance Act," approved April 18, 1967 (Ga. Laws 1967, p. 674), as amended, is hereby amended by striking subsection (a) of Section 4 in its entirety and inserting in lieu thereof a new subsection (a) to read as follows:
>
> "(a) Notwithstanding the provisions of any other law, the finance charge, exclusive of insurance, and other benefits and official fees, shall not exceed the following rates:
>
> Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and all vehicles not previously titled— $10 per $100 per year.
>
> . . .

STATEMENT OF THE CASE

A. Introduction.

Before the Court is an important question of federal preemption of state usury laws for federally backed loans. This question has potentially devastating implications for private lenders and the Government National Mortgage Association ("GNMA"). The United States Court of Appeals for the Eleventh Circuit has interpreted an admittedly ambiguous statute, 12 U.S.C.A. §1735f-7, in such a way that lenders relying in good faith on the availability of federal preemption of restrictive state usury laws are now faced with thousands of loans subject to state usury laws. The draconian penalties associated with state usury laws endanger the solvency of these lenders and raise the possibility that GNMA will ultimately bear the cost of these penalties.

B. Statement of Facts

On February 25, 1982, Jimmy E. Wood and Patricia A. Wood entered into a mobile home retail installment sales contract with Vintage Enterprises, Inc. d/b/a Colonial Mobile Homes, Inc. The contract was for the purchase of a new 1982 Vintage model mobile home. The contract was assigned by Vintage Enterprises, Inc. to Fort Wayne Mortgage Company, a Michigan corporation, which is a lender authorized by the VA to process VA loans for guaranty without prior approval. The amount financed on the contract was $22,400 at an annual percentage rate of 18.5%. The prescribed maximum finance charge for VA guaranteed transactions at the time of the Wood contract was 19%.

The form contract used in connection with this transaction specifies in the lower left hand corner of the front and back pages that it is a VA-FHA-GNMA contract. Plaintiff does not dispute that this is a VA guaranteed credit sale.

C. Proceedings Below

On November 13, 1984, Jimmy E. Wood, a Georgia resident, filed a class action complaint against Fort Wayne Mortgage Company in the United States District Court for the Southern District of Georgia. Plaintiff's complaint invoked the court's diversity jurisdiction under 28 U.S.C.A. §1332 (West Supp. 1987). Plaintiff alleged that the interest rate on his mobile home sales contract was usurious under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§10-1-30 to 38, and that the contract did not meet the requirements for federal preemption of state usury laws.

Mr. Wood seeks, on behalf of himself and the putative class members, a judgment declaring that Fort Wayne is barred from the recovery of any finance charges, delinquency charges or collection charges in connection with the mobile home contracts entered into with the named Plaintiff and the members of Plaintiff's class. Plaintiff also seeks recovery of an amount equal to double the time price differential (interest) charged in connection with each transaction due to the alleged willful nature of the purported violations. There are approximately eight hundred and sixty-two (862) contracts within the plaintiff class. Assuming that each transaction involves a finance charge of at least $20,000, Defendant faces a loss of finance charges totalling $17,240,000, plus a possible penalty of, at a minimum, $34,480,000.

Responding to the complaint, Fort Wayne moved to dismiss and for summary judgment on the grounds that Plaintiff's loan was guaranteed by the Veterans Administration ("VA") pursuant to 38 U.S.C.A. §1819 (West 1979 and Supp. 1987) and under 38 U.S.C.A. §1828 (West Supp. 1987) was therefore exempt from state usury laws.

On March 13, 1985, Judge Dudley H. Bowen, Jr. denied Fort Wayne's motion to dismiss and motion for summary judgment, stating simply that a ruling in favor of Fort Wayne would require the court to overrule its opinion in the case of *Doyle v. Southern Guaranty Corporation*, United States District Court for the Southern District of Georgia, Civil Action File No. CV-184-180 (January 15, 1985). In *Doyle*, a similar case involving an FHA mobile home installment sales contract, Judge Bowen had ruled that a mobile home lender seeking to avoid Georgia's usury limits must comply with the preemption requirements of the Depository Institutions Deregulations & Monetary Control Act of 1980, codified in Note following 12 U.S.C.A. §1735f-7 (West 1980 and Supp. 1987) ("DIDMCA") and could not rely on the preemption provisions for FHA insured loans found in 12 U.S.C.A. §1735f-7.

In his order denying Fort Wayne's motions, Judge Bowen, *sua sponte*, authorized Fort Wayne to petition for immediate appeal pursuant to 28 U.S.C.A. §1292(b) (West Supp. 1987). A petition for interlocutory appeal was filed on March 25, 1985, and was granted by the United States Court of Appeals for the Eleventh Circuit on April 29, 1985.

The Eleventh Circuit consolidated this case with *Doyle*, also on interlocutory appeal. On July 18, 1986,

the Eleventh Circuit issued an opinion in which it decided, in relevant part, that the VA and FHA preemption programs were separate from the DIDMCA preemption program, and that a loan qualifying under the VA or FHA preemption statutes need not also qualify under DIDMCA. The Court of Appeals then held, however, that the Wood loan could not qualify for VA preemption because the State of Georgia had overridden the VA preemption program when, in 1980, the state legislature amended the usury limit on motor vehicle financing, even though the state legislation contained no reference to the VA lending program. At the time of Plaintiff's purchase, mobile home loans were treated as motor vehicle loans. The Eleventh Circuit also certified a question of state law to the Supreme Court of Georgia—whether Georgia's 1983 abolition of interest rate limitations on mobile home loans greater than $3,000 should be applied retroactively to contracts entered into prior to the date of the amendment.

On March 12, 1987, the Supreme Court of Georgia issued its opinion and held that Georgia's 1983 removal of interest rate ceilings on certain mobile home loans did not apply retroactively. Thereafter, on June 5, 1987, the Eleventh Circuit entered its judgment affirming the ruling of the district court and remanding the case to the district court for further proceedings consistent with its decisions. This petition for certiorari follows.

ARGUMENT

I. LEGISLATIVE BACKGROUND

A. Introduction

In 1979, Congress passed the Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, Pub.L. No. 96-128, title IV, §401(a), 93 Stat. 982 (codified at 38 U.S.C.A. §1828 (West Supp. 1987)). A provision of this new law exempted Veterans Administration ("VA") guaranteed loans from existing state usury laws. Congress, however, preserved the states' rights to override the federal preemption if they changed their usury laws applicable to federally insured loans after the effective date of the new federal law. This case involves an interpretation of the statutory language allowing the state override. It arises in the context of a VA guaranteed loan for the purchase of a new mobile home. Before discussing the merits of why this writ of certiorari should be allowed, however, Petitioner respectfully submits that a review of the historical context in which this legislation was enacted will be helpful in understanding the issues at hand.

Toward the end of the 1970's, spiraling interest rates had driven the cost of credit up to record levels. Competition for housing credit was keen and a severe mortgage credit crunch developed. Compounding the problem were restrictive state statutes which set mortgage usury ceilings at rates below that which the creditors themselves were paying. Reacting to this credit squeeze, the flow of mortgage funds was diverted to those states which allowed more competitive interest rates. In addition, the maximum interest rate permitted by the FHA and VA for their mortgage

loan insurance and guaranty programs exceeded the rates allowed by certain states' usury laws. In those states, lenders were accordingly discouraged from making any FHA or VA loans. The scenario which resulted was one in which the distribution of available credit was unevenly spread across the nation, with housing credit in many states becoming almost unavailable. Repercussions were felt in every phase of the housing industry, frustrating national housing policies and programs.

Manufactured home financing was especially hard hit since the restrictive and ambiguous usury ceilings were more troublesome for manufactured housing lenders than for traditional housing lenders. One problem in particular was uncertainty over applicable usury limits for a residential manufactured home loan which, in many states, was treated differently than a residential real property loan. *See, Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. (April 27, 1979). (statements by Harvey Weiner, Coordinating Council on Manufactured Housing Finance).

In response to this situation and to stabilize the home financing system, the federal government, among other things, removed state mortgage rate ceilings on federally insured loans. *See generally*, S.Rep. No. 368, 96th Cong., 1st Sess. 18-19 (1979), reprinted in 1980 U.S. Code Cong. and Ad. News 236, 254-55. Federal preemption of state usury laws served many national objectives. It stabilized the nation's mortgage market, facilitated a national housing policy, aided the functioning of a national secondary

market in mortgage lending, and helped assure the stability of the nation's financial system. *Id.*

B. The 1979 VA Usury Preemption, 38 U.S.C.A. §1828

The federal usury preemption for VA loans, for both traditional and manufactured homes, was signed into law on November 28, 1979. Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, Pub.L. 96-128, title IV, §401(a), 93 Stat. 982, 986 (codified at 38 U.S.C.A. §1828 (West Supp. 1987)). Under §1828, wherever loans insured by the Federal Housing Administration (FHA) under title I or title II of the National Housing Administration Act, 12 U.S.C.A. §§1701-1750g (West 1979 and Supp. 1987), are exempted from state usury laws under any federal law, VA loans are also exempt.

The Conference Report accompanying this legislation stresses the importance that Congress placed on the VA usury preemption as a means of achieving nationwide the goals of the VA mobile home loan program. Conference Report to the Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, 96th Cong., 1st Sess., 125 Cong. Rec. 32589, 32592 (daily ed. Nov. 15, 1979).

> Thus, the committee emphasizes that the purpose of this provision as modified is to assure, to the maximum extent possible in any jurisdiction in which FHA loans are exempt, that no veteran seeking to use his or her loan-guarantee entitlement, whether for a conventional home, mobile home, home improvement, or any other authorized purpose, shall be discouraged or prevented from such purpose by reason of a State antiusury pro-

> vision. Because one of the major purposes of the VA mobile home loan program is to assist Vietnam-era veterans to acquire homes, the committee strongly urges the VA to provide adequate and complete information concerning this provision to appropriate staff officials and to the financing community.

Id.

C. The 1979 FHA Usury Preemption, 12 U.S.C.A. §1735f-7

The VA exemption from state usury laws found at 38 U.S.C.A. §1828 is a derivative preemption statute which piggy backs the usury exemption available to FHA insured loans. Simply put, if the loan would be exempt from state usury laws as an FHA insured loan, it would also be exempt as a VA guaranteed loan. Congress' purpose in enacting the VA exemption in this manner was "to assure a coordinated Federal policy with regard to the application of State anti-usury provisions to FHA and VA home loans." Senate Report (Veterans' Affairs Committee) to Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, No. 260, 96th Cong., 1st Sess., reported in 1979 U.S. Code Cong. and Ad. News, p. 1894, 1915-1917.

The National Housing Act provides the relevant exemption from state usury laws for FHA insured loans (and thus preemption for VA guaranteed loans). This preemption, codified at 12 U.S.C.A. §1735f-7, provides as follows:

> (a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges

> which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received or reserved shall not apply to any loan, mortgage, or advance which is insured under subchapter I or II of this chapter [i.e., FHA loans].
>
> (b) The provisions of subsection (a) of this section shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance.

12 U.S.C.A. §1735f-7 (West 1980).

Under subsection (b) of §1735f-7, a state could elect to override the FHA preemption if, after the effective date of §1735f-7, that state passed a law which limited the allowable interest rate on any FHA insured loan, mortgage or advance. In its section by section analysis of the Housing and Community Development Amendments, of which §1735f-7 is a part, the Senate's Report states that the FHA usury preemption "would not apply where a state subsequently reenacts a usury limit applying to FHA loans." S.Rep. No. 164, 96th Cong., 1st Sess. 33 (1979). The Report also provides that "[T]he section would allow States to reenact a usury limit applicable to FHA mortgages subsequent to enactment of this provision." *Id* at 22. The Report of the House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 154, 96th

Cong. 1st Sess. 24, reported in 1979 U.S. Code Cong. and Ad. News 2317, 2340, notes that states could override the FHA preemption if they took subsequent action "to subject these FHA instruments to state usury ceilings." In short, as the above legislative history reveals, it was Congress' intent that states seeking to override the FHA preemption found in §1735f-7 had to specifically change the rates applicable to FHA loans.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN ITS INTERPRETATION OF THE OVERRIDE PROVISIONS OF THE FHA USURY PREEMPTION, 12 U.S.C.A. §1735f-7.

In the consolidated opinion entitled *Doyle v. Southern Guaranty Corporation*, 795 F.2d 907 (11th Cir. 1986), the Court of Appeals held that Georgia overrode the FHA and VA preemptions by amending its Motor Vehicle Sales Finance Act ("GMVSFA") in 1980 to raise the allowable interest limit on Class 1 "motor vehicle" retail installment contracts from eight percent (8%) to ten percent (10%) add-on. *Id.* at 912-914. The Court of Appeals expressly noted that the 1980 amendments to GMVSFA referred to neither "federally insured" loans nor the FHA/VA preemption statutes. *Id.* at 912. In its decision, the Court of Appeals interpreted §1735f-7(b), the subsection allowing state override, to not require such a reference.

The Court of Appeals conceded that there were two possible interpretations of the override language found in subsection (b) of the FHA preemption. Under the first, propounded by Petitioner Fort Wayne, the state law must refer specifically to federally insured loans

or loans insured by the FHA in order to override the preemption. Under the second, submitted by Plaintiff-Respondents, a state need only pass a statute limiting the amount of interest which could be charged. There are no case law decisions on this particular point, and the Court of Appeals could discern no clear direction from the legislative history. With no other guidance, the Court of Appeals rested its decision on the fact that another federal statute, DIDMCA, (codified in the Note following 12 U.S.C.A. §1735f-7 (West 1980 and Supp. 1987), contains a preemption provision which is clear in requiring specific language in state statutes seeking to override its preemption. Under the reasoning that Congress knew the type of language to use when it intended that state override provisions make specific reference to the federal preemption, the Court of Appeals concluded that the FHA preemption, which is not as clear as DIDMCA, did not require a specific reference to the federal preemption law in order for a state to effect an override.[2]

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[2] The Court of Appeals' decision in footnotes cites an opinion letter from Shirley Wiseman, General Deputy Assistant Secretary for Housing, clarifying HUD letter TI-352, December 16, 1983. *Doyle v. Southern Guaranty Corp., supra*, 795 F.2d at 912, n. 12 and 913, n. 16. In the second citation appearing in footnote 16, the opinion letter is read to support the Court of Appeals' conclusion that an override of federal preemption occurs when a state merely passes a law limiting the interest rate on manufactured home loans. It is Petitioner's view that, with respect to the override question, the Court of Appeals' reliance on the opinion letter is misplaced. The introductory paragraph of the letter states that it was written in response to a question on another issue. Ms. Wiseman's comments interpreting the override mechanism were gratuitous dicta and should be disregarded.

Petitioner respectfully submits that the opinion of the United States Court of Appeals is erroneous and that this important federal law question on the construction of the National Housing Act's preemption provisions should be resolved by this Court.

A. An Examination of the Language of §1735f-7, As a Whole, Reveals Congress' Intent That States Which Choose to Override the FHA Preemption Have to Specifically Refer to FHA or Federally Insured Loans in Their Override Legislation.

Careful review of the language of the FHA preemption, 12 U.S.C.A. §1735f-7, shows that Congress intended for states to expressly refer to federally insured or FHA loans in any legislation seeking to override the federal preemption. By its terms, §1735f-7 is separated into two subsections—(a) and (b). Subsection (a) preempts state usury limits only on loans "insured under subchapter I or II of this chapter," i.e., FHA loans. Subsection (b) then gives the states the opportunity to decline or override the preemption.

To determine whether subsection (b) requires states to explicitly refer to federally insured or FHA loans in their override legislation, the key question is: What is meant by the word "such" on the last line of subsection (b)? It is Petitioner's view that the "such" refers to FHA insured loans. Thus, the reader should mentally insert "FHA insured" where the word "such" appears. According to this view, subsection (b) requires states to expressly change their interest rates on FHA loans in order to achieve an override of subsection (a). The logic of the position is clearly shown from a careful analysis of the language employed by Congress.

For convenience of analysis only, subsection (b) of §1735f-7 will be divided into two subparts. Subsection (b), as so divided, follows:

> (i) The provisions of subsection (a) of this section shall apply to loans, mortgages, or advances made or executed in any State until
>
> (ii) the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any *such* loan, mortgage, or advance.

12 U.S.C.A. §1735f-7(b) (subpart delineation (i) and (ii) added) (emphasis added).

The phrase "loan(s), mortgage(s), or advance(s)" is used twice in subsection (b): once in that part identified above as subpart (i), and once in that part identified above as subpart (ii). In subpart (i), the phrase "loans, mortgages, or advances" is necessarily modified by subsection (a) of §1735f-7 which limits the usury preemption to "any loan, mortgage, or advance *which is insured* under subchapter I or II of this chapter." (emphasis added). Failure to recognize this implicit modification would mean that subsection (b) of §1735f-7 would be applicable to *any* loan, mortgage, or advance. This is obviously incorrect. A reading of §1735f-7, as a whole, clearly shows that the "loans, mortgages, or advances" mentioned in subpart (i) of subsection (b) are limited to those to which subsection (a) applies.

The phrase "loan, mortgage, or advance" appears again in subpart (ii) of subsection (b), this time modified by the word "such." Under the common rules

of construction, the word "such" refers the reader to a previous modifier. At first glance, it is difficult to tell what modifier is intended. Upon closer examination, however, it is clear that the "such" must refer to the limitation in subsection (a) regarding "any loan, mortgage, or advance which is insured under subchapter I or II of this chapter." This is so because, as discussed above, the earlier reference in subpart (i) of subsection (b) to "loans, mortgages, or advances" is necessarily modified by the phrase "insured under subchapter I or II of this chapter." Thus, even if the "such" refers the reader to this earlier reference in subpart (i), the implicit modification of subsection (a) cannot be ignored. Accordingly, when Congress provided that a state could decline or override the preemption provided for FHA insured loans if that state passed a law "limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance," Congress meant for states to expressly refer to federally or FHA insured loans in their override legislation.

B. The Court of Appeals' Interpretation Creates Anomalous Results

The Court of Appeals interpreted the language of §1735f-7 to mean that any enactment or reenactment by a state of its usury limitations would effect an override of the federal preemption. The Court of Appeals indicated that there are no applicable qualifications on this override. All a state need do is enact an interest rate limitation or change its existing interest rate, whether up or down, and the override would automatically occur—regardless of whether the state intended it to occur. This holding creates the anomaly that even if a state intended to maintain the

federal preemption for federally insured loans, it could not enact or change an interest rate limitation without causing an override.

In Georgia, for example, home loans other than manufactured home loans are governed by O.C.G.A. §7-4-3 included in chapter 4 of title 7 of the Georgia Code concerning interest and usury. (Manufactured home loans, on the other hand, are generally governed by the Motor Vehicle Sales Finance Act, O.C.G.A. §§10-1-30 to 38.) Interestingly, at the time of the loan in question, §7-4-3 set a flexible maximum rate of interest for real estate loans but provided in subsection (c)(5) that: "Real estate loans, the repayment of which is guaranteed or insured by the United States or by any agency or instrumentality thereof, shall not be subject to any maximum rate of interest . . ." O.C.G.A. §7-4-3(c)(5).

The flexible interest rate set forth in §7-4-3, as it existed at the time of Plaintiff-Respondent's loan, had been enacted just nine months prior to the effective date of the FHA preemption. If §7-4-3 had been passed after the FHA preemption, then, under the decision of the Court of Appeals, it would have worked as an override of the FHA preemption even though subsection (c)(5) of §7-4-3 expressly indicated that Georgia did not intend an override. This means that any state which has enacted or changed the interest rate limitations since December 21, 1979, the effective date of U.S.C.A. §1735f-7, would not be entitled to the benefit of federal preemption for FHA or VA loans even if that state wanted to retain those benefits. It is unknown how many states have inadvertently triggered an override.

C. The Decision of the Court of Appeals, if Allowed to Stand, Would Have a Disastrous Impact on the FHA and VA Federally Insured Mortgage Programs.

In the event the Court of Appeals' decision is allowed to stand and the Petitioner's VA guaranteed loans are not preempt from Georgia state usury laws, similar individual and class actions will undoubtedly be filed in the Eleventh Circuit and nationwide.[3] Proliferation of these cases will jeopardize the viability of federal programs designed to provide housing assistance and impose significant economic hardships on the manufactured housing industry and its related mortgage finance markets.

In passing legislation authorizing a federal guaranty of securities backed by pools of mortgages insured or guaranteed by the FHA, Congress intended to stimulate private sector investments in federal housing programs. As a by product, FHA and VA loan programs have made homes available to thousands of veterans and other Americans who otherwise would not have been able to obtain mortgages. FHA and VA borrowers have also benefited from the more lib-

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[3] At present, the following class actions involving mobile home loans are pending in the Southern District of Georgia: *Doyle v. Southern Guaranty*, Civil Action File No. CV-184-180; *Wood v. Fort Wayne Mortgage Company*, Civil Action File No. CV-184-204; *Dinkins v. First Carolina Finance*, Civil Action File No. CV-185-241; *Goldson v. Colwell Mortgage Company*, Civil Action File No. CV-187-075; *Atkinson v. General Electric Credit Company*, Civil Action File No. CV-187-076; *James v. Green Tree Acceptance*, Civil Action File No. CV-187-070. Discovery documents in the *Doyle*, *Wood*, *Dinkins* and *Goldson* cases reflect that, in these four cases alone, there are over 9,226 loans in the putative classes.

eral down payment terms and consumer protections afforded by FHA and VA loans.

Congress achieved these results by creating the Government National Mortgage Association ("GNMA") mortgage backed securities program which developed a secondary market for mortgage loans. GNMA is a wholly owned government corporation within the United States Department of Housing and Urban Development ("HUD"). Through the mechanism of supplying a secondary market, GNMA creates and stimulates mortgage credit. This, in turn, supports the government's housing goals by helping to provide funds to that portion of the housing market for which conventional financing is not readily available. Security for capital investment in housing (manufactured and traditional) is provided by GNMA's guaranty of the timely payment of principal and interest for the securities which are backed by pools of FHA insured or VA guaranteed loans. In addition, the GNMA guaranty covers the loss the investor would suffer due to a mortgage default that exceeds the federal insurance or guaranty provided by FHA or VA. The GNMA guaranty is backed by the full faith and credit of the United States.

The GNMA program works in the following general manner. Approved lenders, in their capacity as issuers of GNMA securities, obtain commitments from GNMA to guarantee the securities backed by mortgage pools. Once this commitment is obtained, the GNMA guaranteed mortgage backed securities may then be sold to investors. In most cases, the issuers have solicited advance commitments from dealers, investment bankers, or investors to purchase specific amounts of the securities at a set price and yield. The issuing lenders

also service the underlying pool of mortgages by collecting monthly payments on the pooled mortgages and remitting this amount, less the service fee, to certificate holders.

The affidavit of Louis Gasper, the executive vice president of GNMA (which affidavit is included in the record in this case and in appendix "G" attached hereto) thoroughly explains that a finding of usury in the present case would have grave consequences for GNMA and for all of the federal programs benefitting from private sector investment in housing. Over ninety percent (90%) of all FHA insured and VA guaranteed manufactured home loans are placed in GNMA pools. Nearly 1.75 million federally insured or guaranteed manufactured home loans have been made because of the existence of the GNMA program, totalling approximately $4.7 billion in securities backed by manufactured home loans since the founding of the GNMA program. Gasper Affidavit at 5-6.

It is respectfully submitted that the Court should not underestimate the significance to GNMA and the federal government of the issues at hand. If a large number of FHA and VA manufactured home loans, which relied on the FHA and VA usury preemptions, were found to be outside those preemptions and thus usurious, the stability of GNMA and the other federal housing programs would be threatened. Lenders would be subjected to massive civil penalties which alone could bankrupt many mortgage banking lenders.

On an individual loan basis, a finding of usury could also render a loan ineligible to remain in its respective GNMA pool since the finding would most likely void the FHA insurance or VA guaranty. This would mean that the loan in question would no longer be eligible

to back GNMA securities. The GNMA securities issuer would thus be forced to buy out the ineligible loans from the pools by paying the securities holders the current outstanding principal balance of the loans from the issuer's own funds. This would be very likely to cause many issuer defaults and bankruptcies, forcing GNMA to step in and, with its own resources, backed by the full faith and credit of the United States, to make the investors whole and terminate the pools prematurely.

Currently, there are approximately $4.6 billion in GNMA manufactured home securities outstanding. *Id.* at 5. Obviously, not all of these loans rely on usury preemption. It is fair to assume, however, that a large percentage of them did, and those that did most likely relied on the FHA and VA preemptions. It is readily apparent that the issue at hand could have nationwide impact. The ramifications of the Court of Appeals' decision, if not reviewed and corrected, could produce serious harm to both GNMA and the entire federal housing program.

CONCLUSION

A careful reading of the FHA preemption statute, 12 U.S.C.A. §1735f-7, shows that it was Congress' intent that states seeking to override the FHA preemption would explicitly refer to FHA or federally insured loans in their override legislation. The statute's legislative history supports this interpretation. The construction of §1735f-7 adopted by the Eleventh Circuit is erroneous and will have grave consequences for GNMA and existing federal housing programs. For the reasons set forth in this petition, a writ of certiorari should be granted to review the judgment

and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

WYCK A. KNOX, JR.

JENNIFER E. HASSEL

TED H. CLARKSON

Of Counsel:

KNOX & ZACKS, P.C.

P.C. Post Office Box 2043

Augusta, Georgia 30903

(404) 724-2622

APPENDIX

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-8187

RICHARD DOYLE,
Plaintiff-Appellee,

versus

SOUTHERN GUARANTY CORPORATION,
Defendant-Appellant.

No. 85-8297

JIMMY E. WOOD,
Plaintiff-Appellee,

versus

FORT WAYNE MORTGAGE CO.,
Defendant-Appellant,

Appeals from the United States District Court for the Southern District of Georgia

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(July 18, 1986)

Before RONEY and Clark, Circuit Judges, and FAIRCHILD*, Senior Circuit Judge.

RONEY, Circuit Judge:

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*Honorable Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Some federal statutes permit exemption from state usury laws if mobile home financing contracts afford protections to the consumer set forth in the federal laws. Not all the federal statutes require the same protection. These diversity jurisdiction usury cases present the question of whether FHA or VA-insured mobile home agreements, which provide the protections required by those separate Acts, are exempt from Georgia usury laws, even though the contracts do not contain the terms required by another federal exemption statute, section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA). DIDMCA was the statute dealt with in two recent *en banc* decisions. *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985) *(en banc), cert. denied,* 54 U.S.L.W. 3762 (1986); *Grant v. General Electric Credit Corp.*, 764 F.2d 1404 (11th Cir. 1985) *(en banc), cert. denied,* 54 U.S.L.W. 3762 (1986).

This is a consolidated appeal of two cases, one involving an FHA-insured agreement,[1] the other a VA-insured agreement.[2] We make three decisions at this time and certify a controlling question of state law to the Supreme Court

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[1]Plaintiff in *Southern Guaranty Corp. v. Doyle* purchased a new mobile home from Family Homes Sales Center, Inc., d/b/a Eagle Homes Sales Center. Family Homes assigned the retail sales installment contract, dated January 25, 1983, to Southern Guaranty Corporation. The amount financed was $11,474.76, and the total finance charge over the contract's 15-year term was to be $17,507.04. The finance charge on plaintiff's contract exceeded the amount permitted under O.C.G.A. § 10-1-33 by $294.90. This contract was insured by the Federal Housing Authority.

[2]Plaintiff in *Fort Wayne Mortgage Co. v Wood* purchased his mobile home on February 25, 1982 from Vintage Enterprises, Inc., d/b/a Colonial Mobile Homes, Inc. Vintage Enterprises assigned the retail installment sales contract to Fort Wayne Mortgage Company. The contract has a 15-year term. The amount financed was $22,400.00 and the finance charge $43,987.60. This finance charge exceeded the amount permitted under O.C.G.A. § 10-1-33 by $10,387.60. This contract was insured by the Veterans Administration.

of Georgia. *First,* we hold that a lender who complies with the requirements of the FHA or VA preemption statutes, for loans guaranteed under those statutes, need not also comply with DIDMCA in order to exempt itself from state usury limits on mobile home retail installment contracts. *Second,* we hold that the State of Georgia overrode the FHA and VA preemptions when it amended its usury limit on mobile home transactions in 1980 and 1981, even though the amendments referred to neither the FHA/VA statutes nor to FHA/VA-insured loans. *Third,* we hold that the Georgia statute of limitations does not bar these suits.

We *certify* to the Supreme Court of Georgia one question: whether Georgia's 1983 abolition of interest ceilings on mobile home retail installment contracts of the dollar amounts involved here eliminated the cause of action for usury of those purchasers who entered their contracts prior to the amendments' effective date.

Under Georgia law, a lender who violates the finance charge limitations contained in the Georgia Motor Vehicle Sales Finance Act (GMVSFA) is barred from recovering *any* of the finance charge. O.C.G.A. § 10-1-38(b). A lender who willfully violates the statute is subject to an additional penalty of double the time-price differential. O.C.G.A. § 10-1-38(c). The finance charge on both contracts involved here exceeded the maximum rate of interest (10% add-on) then allowed under GMVSFA. O.C.G.A. § 10-1-30 *et seq.*

The cases came to us on a 28 U.S.C.A. § 1292(b) appeal of the legal questions decided by the district court in denying defendants' motions for dismissal for failure to state a cause of action and summary judgment.

The district court held that an FHA or VA-insured mobile home lender may not rely on the FHA or VA preemption statutes alone, but rather must also comply with the DIDMCA regulations in order to receive federal exemption from the state usury laws. On this point, we reverse the district court. The district court held that Georgia's 1983

amendments eliminating interest rate limits on mobile home retail sales installment contracts of $3000.00 or more apply prospectively only and did not affect the causes of action herein asserted. This point we certify to the Supreme Court of Georgia. The district court also ruled on class action and discovery issues which are inappropriate for us to decide.

A. FHA/VA Versus DIDMCA

The FHA and the VA preemption statutes were enacted at approximately the same time.[3] The VA statute received

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[3]The FHA preemption statute was enacted as section 308 of the Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, 1113-14, approved on December 21, 1979. The statute is codified at 12 U.S.C.A. § 1735f-7, as follows:

> (a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, or advance which is insured under subchapter I or II of [the National Housing Act].
>
> (b) The provisions of subsection (a) shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance.

Although this section does not refer expressly to mobile home loans, the National Housing Act includes certain mobile home loans within the class of insurable loans. 12 U.S.C.A. § 1703.

The VA preemption statute was enacted as section 401 of the Veterans' Disability Compensation and the Survivors' Benefits Amendments of 1979, Pub. L. No. 96-128, 93 Stat. 982, 986-87, approved November 28, 1979. It is codified at 38 U.S.C.A. § 1828 (as amended in 1981), as follows:

> If, under any law of the United States, loans and mortgages in-

final approval several days before the FHA statute. It makes the VA exemption the same as that provided for FHA loans. Therefore, the intent and consequences of both statutes should be the same on the issue before us.

Although the published legislative history regarding the FHA preemption statute gives little guidance as to Congress' purpose in enacting the federal preemption, the VA legislative history provides some insight as to the purpose of the joint FHA/VA preemption.

The Senate Report accompanying the VA legislation noted that although the purpose of state usury laws is to protect state residents against exorbitant interest rates, the laws may effectively "bar lenders from making VA loans and thus prevent veterans from using their loan-guaranty entitlement." S. Rep. No. 260, 96th Cong., 1st Sess. 30, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1894, 1916. Usury limits in several states were impeding FHA and VA loans, and in Arkansas, the state limit was so low as to have "brought VA loan activity to a virtual halt." *Id.* The purpose of the preemption provision was to assure, to the maximum extent possible in any jurisdiction

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sured under title I or title II of the National Housing Act are exempt from the application of the provisions of any State constitution or law (1) limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders, (2) restricting the manner of calculating such interest (including prohibition of the charging of interest on interest), or (3) requiring a minimum amortization of principal, then loans guaranteed or insured under this chapter are also exempt from the application of such provisions.

"Under this provision, wherever loans insured by the Federal Housing Administration (FHA) are exempted from a State anti-usury provision by a provision of the National Housing Act, . . . VA loans would also be exempted. In this way, the coordination of Federal policy regarding the exemption of VA and FHA home loans from State anti-usury provisions would be assured." S. Rep. No. 260, 96th Cong., 1st Sess. 29, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1894, 1915.

in which FHA loans were exempt, that a veteran seeking to use his or her loan-guarantee entitlement for a conventional home, mobile home, or any other authorized purpose would not be discouraged or prevented by reason of a state anti-usury provision. Explanation of House Bill, Senate Amendment, and Compromise Agreement, 125 Cong. Rec. 16,753, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1966, 1969. Under both the FHA and VA provisions, however, "the State's right to set an interest-rate limitation that overrides the Federal exemption would be preserved." S. Rep. No. 260, *supra,* at 31.[4]

Within four months after the FHA and VA exemptions became law, Congress enacted a third federal preemption provision, DIDMCA, referred to here as section 501.[5] This statute preempts state usury laws with regard to a broad range of residential loans and lenders. A Senate committee reported that the bill was a response to the finding that in states where usury laws require mortgage rates below market levels of interest, mortgage funds will not be readily available and those funds will flow to other states where market yields are available. This artificial disruption of funds availability is harmful to potential homebuyers in states with such usury laws and frustrates national housing policies and programs. S. Rep. No. 368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 254.[6]

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[4]Under the scheme in the VA statute, "any State that overrode the exemption for FHA loans would also be overriding the exemption for VA loans." S. Rep. No. 260, *supra* note 3, at 31. The purpose of providing for an exemption in this manner was "to assure a coordinated Federal policy with regard to the application of State anti-usury provisions to FHA and VA home loans." *Id.*

[5]Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, § 501, 94 Stat. 132, 161-63 (codified as amended at 12 U.S.C.A. § 1735f-7 note).

[6]The committee further opined that "this modification in state usury

Because of "the congressional policy of permitting a state the primary opportunity to determine its usury statutes," *id.* at 18, however, section 501 provided that an individual state could within three years enact a law specifying that the state intended to override section 501.

In order for mobile home financing to come under the DIDMCA preemption, the financing contract must contain certain consumer protection provisions specified in Federal Home Loan Bank Board regulations.[7]

This Court concludes that although the DIDMCA statute encompasses the "federally related" mobile home loans involved in this case and therefore overlaps with the FHA and VA preemptions, this dual coverage does not nullify the FHA and VA preemptions as applied to mobile home loans. FHA or VA lenders may obtain federal preemption under the respective FHA or VA preemption without also satisfying the DIDMCA requirements. If, however, the state has overridden the FHA/VA preemption, the lender may still qualify for federal preemption by complying with the DIDMCA regulations (unless, of course, the state has also overridden the DIDMCA preemption). These conclusions come from the following analysis.

All of the statutes in question were enacted by the 96th Congress in a six-month time span. The same House and

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laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending." S. Rep. No. 368, *supra*, at 19.

[7]These include late charges only when a payment is 15 days late, and 30 days notice before acceleration or foreclosure. Both the Doyle and Wood contracts permit assessment of a late charge for any payment which is 10 days late and do not contain a requirement of notice before acceleration or foreclosure. Under this Court's recent decision in *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985) *(en banc), adopting* 727 F.2d 1067 (11th Cir. 1984), *cert. denied*, 54 U.S.L.W. 3762 (1986), the Doyle and Wood contracts are not entitled to the DIDMCA preemption.

Senate committees considered both the FHA and DIDMCA statutes.

The FHA and VA statutes aimed at addressing the specific problem of state usury laws restricting FHA and VA home loan availability to qualified purchases. In contrast, the purpose of DIDMCA was more wide-ranging. DIDMCA applied not only to federally insured loans but to all home loans, including conventional loans, which were in some way "federally related," a phrase defined broadly in section 501. "The law seeks to facilitate the free flow of capital into states with restrictive interest rates." *Recent Developments*, 36 Bus. Law. 1237, 1243 (1981). Congress believed the DIDMCA preemption was needed to enhance the stability of the national financial system and to facilitate a national housing policy.[8]

It is unreasonable to believe that Congress, in addressing the more immediate concern of FHA and VA loan availability to individual borrowers, would require the lender to comply with the additional DIDMCA regulations in order to obtain federal preemption. The district court and plaintiffs have placed great reliance on the supposedly "better" consumer protection the DIDMCA regulations provide. Nothing, though, indicates that the FHA and VA protections are inadequate.[9] Although the regulations ap-

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[8] "A stable home financing system was the principal reason for the establishment by the federal government of the FHA and VA associations and the national secondary market mechanisms." S. Rep. No. 368, *supra*, at 19.

[9] In the House Conference Report accompanying the FHA legislation, the conferees noted their awareness that

> . . . installment credit sale contracts have been criticized for frequently containing provisions which do not adequately protect consumers. However, the conferees note that with respect to such contracts used to finance mobile homes under Title I of the National Housing Act, FHA regulations already provide significant protections by prohibiting both the Rule of 78 and balloon pay-

pearing under DIDMCA are not identical to the FHA and VA regulations,[10] they address similar concerns and overlap substantially. Indeed, the House Conference Report accompanying DIDMCA stated: "The conferees intend that in developing [the DIDMCA] regulations the Bank Board should look for guidance to regulations, handbooks and circulars of the FHA and VA regarding mobile home lending . . . ." H.R. Conf. Rep. No. 842, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Ad. News 298, 309.

Several other points support independent interpretation of the FHA, VA, and DIDMCA preemptions. First, section 529 of DIDMCA repealed certain existing laws but made no mention of the FHA or VA preemption statutes. Second, section 528 of DIDMCA[11] demonstrates that Congress intended to retain independent vitality in the respective statutory schemes. Finally, a HUD opinion letter supports this interpretation.[12]

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ments, and by limiting late charges. FHA also provides an interest rate ceiling.

H.R. Conf. Rep. No. 706, 96th Cong., 1st Sess. 61, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2402, 2420.

[10]The regulations governing FHA-insured manufactured home loans, appearing at 24 C.F.R. §§ 201.501-.680, require prepayment rebates, prohibit the use of balloon payments, and govern late charges and refinancing. Additionally, although that limitation has now been repealed, the FHA regulations limited the maximum permissible finance charge at the time Doyle obtained his loan. Similar regulations, appearing at 38 C.F.R. § 36.4201 *et seq.*, govern VA-insured manufactured home loans.

[11]"In any case in which one or more provisions of, or amendments made by, this title, section 529 of the National Housing Act, or any other provision of law . . . apply with respect to the same loan, mortgage, credit sale, or advance, such loan, mortgage, credit sale, or advance may be made at the highest applicable rate." 12 U.S.C.A. § 1735f-7 note.

[12]An April 1, 1985, opinion letter from Shirley Wiseman, General

At the time the FHA and VA preemptions were enacted, DIDMCA was well through the congressional committee process. It simply defies reason that Congress would enact one preemption if it were considering a second preemption which would render the first meaningless. This Court holds that a lender entitled to preemption under the FHA or VA statutes need not comply with the DIDMCA regulations.

B. State Override

The next question presented to this Court is whether the State of Georgia has overridden the FHA and VA preemptions. The district court did not reach this issue due to its resolution of the first issue. Because under the VA provisions "any State that overrode the exemption for FHA Loans would also be overriding the exemption for VA loans," S. Rep. No. 260, *supra*, at 31, this Court need only examine whether Georgia has overridden the FHA provision.

Soon after the effective date of the FHA and VA preemption statutes, the Georgia General Assembly amended O.C.G.A. § 10-1-33 to raise the interest limit on Class 1 "motor vehicle" retail installment contracts to 10% add-on. "Motor vehicle" loans are defined to include mobile home loans, but section 10-1-33 does not apply to other types of home loans or mortgages. The 1980 amendments

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Deputy Assistant Secretary for Housing, clarifying HUD letter TI-352 (Supplement), states: "It was then, and is now, this Department's interpretation of the two preemption laws that they are separate and independent of each other, and that if a manufactured home lender can charge a preemptive interest rate pursuant to § 529 of the National Housing Act it need not rely upon § 501 of the Deregulation Act, and thus need not comply with 12 C.F.R. 590.4."

to section 10-1-33 refer to neither "federally insured" loans nor the FHA/VA preemption statutes. 1980 Ga. Laws 523.[13]

The finance companies argue that the phrase "*such* loan, mortgage, or advance" in the FHA statute, 12 U.S.C.A. § 1735f-7(b), quoted *supra* note 3, refers back to subsection 9(a) of the statute, and that the state law must refer specifically to loans insured under titles I and II of the National Housing Act in order to override the preemption. Plaintiffs, on the other hand, suggest that "such loans" refers to the type of loan being made, such as real estate loans or mobile home loans, and that a state need only pass a statute regulating the general type of credit transaction. Because Georgia subsequently amended GMVSFA to raise and "reinstate" the usury limits on mobile home contracts, plaintiffs argue, Georgia has overridden the FHA and VA preemptions for mobile home transactions.

The language of the FHA statute is less than clear and would support either of these interpretations. The legislative history, moreover, provides no firm guidance.[14] The

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[13]The Act itself states that it amends GMVSFA "so as to change the limitations on finance charges; to provide for the computation of "finance charges on an actuarial basis in addition to the add-on basis; to delete the acquisition charge; to provide for other matters relative thereto; to provide for an effective date; to provide for automatic repeal; to provide for reinstatement of certain finance charges; to repeal conflicting laws; and for other purposes." 1980 Ga. Laws at 523-24. A 1981 amendment struck the repealer provision. 1981 Ga. Laws 703.

[14]The Senate Committee Report on the FHA legislation notes that the preemption "would not apply where a state subsequently reenacts a usury limit *applying to FHA Loans.*" S. Rep. No. 164, 96th Cong., 1st Sess. 33 (1979). Similarly, the House Report notes that "subsequent to the date of enactment of this Act, the states may act to *subject these FHA instruments* to state usury ceilings." H.R. Rep. No. 154, 96th Cong., 1st Sess. 24, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2317, 2340. On the one hand, this language could be read to require specific reference to FHA instruments in the state law. On the other, it could be read as simply requiring that the state law "apply" to FHA insured loans without necessarily singling them out in the

Court concludes, however, that the statute must be read to require only that the state reenact its anti-usury provision and not to require specific reference to FHA-insured loans.

Unlike the FHA preemption, the DIDMCA preemption is clear in mandating specific language in the state override provision.[15] Congress was already considering this language at the time that the FHA preemption was enacted. Congress knew the type of language to use when

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statute.

In another part of the House Report, the House committee states:

> Section 310 of the bill would add a new section 529 to the National Housing Act which would provide that the provision of any State constitution or law expressly limiting the rate or amount of interest, discount points or other charges which may be charged or received by lenders shall not apply to any loan, mortgage or advance which is insured under titles I or II of the National Housing Act. The section would also provide that this exemption would not apply to such loans, mortgages or advances if a State were to enact *such a limitation* after the effective date of this section.

Id. at 63. The phrase "such a limitation" here seems to refer to the state's general usury law; that is, the state need only reenact its usury law to override the preemption. The Senate Report accompanying the VA legislation also supports this interpretation. Discussing the effect of the FHA Legislation, the Senate Report states that loans insured under title I or II of the National Housing Act "would not be exempt in any State that reinstated its anti-usury provision after the effective date of the new Federal law." S. Rep. No. 260, *supra* note 3, at 31.

[15]

> [T]he provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, *which states explicitly and by its terms* that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State.

Section 501(b)(2) (codified at 12 U.S.C.A. § 1735f-7 note).

it intended that state override provisions make specific reference to the federal preemption. The Department of Housing and Urban Development apparently also interprets the respective statutes in this manner.[16]

The lenders have argued that it is illogical to conclude that a state could override the FHA and VA preemptions by merely adjusting the permissible interest rate on some loans which may be insured, as there would be many unintentional overrides, and the result would create instability in the FHA and VA programs and frustrate the policies behind the federal legislation. This argument overstates the case. The FHA and VA preemptions were enacted in large part because individual states had been unable or unwilling to amend their usury limits to reflect increases in market interest rates. Congress was concerned with assisting states such as California and Arkansas, which had troublesome procedures for removing or raising state constitutional or statutory limits. *See, e.g.*, S. Rep. No. 260, *supra*, at 30. At the same time, Congress recognized its traditional deference to the state's right to determine its usury statute. When the state goes through the entire legislative or constitutional process of reenacting or amending its usury limitation, it is unlikely that it will

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[16]The April 1985 letter from the General Deputy Assistant Secretary for Housing, *supra* note 12, states that under the FHA preemption "an override occurs if a State enacts a provision of law after the effective date of § 529 which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan. . . . On the other hand, the ability of a State to override the § 501 [DIDMCA] preemption is more circumscribed, because . . . the State must either adopt a law or certify that the voters of the State have voted in favor of a provision which states explicitly and by its terms that it does not want the provisions of § 501(a)(1) to apply in that State." Additionally, the letter sets forth four scenarios of possible legislative action. In three of those scenarios, the state "enacts a law which limits the rate or amount of interest, discount points, or other charges *on a manufactured home loan.*" In all three scenarios, the letter concludes that the state has overridden the FHA preemption.

do so in ignorance of the federal preemptions or of market forces. For a state to raise its usury limit in response to changes in market interest rates is consistent with the purpose of the FHA and VA preemptions. The Court determines, given Congress' deference to states' rights to fix their own usury law, as well as the purpose behind the federal law, that when a state reenacts or raised its usury limit on a particular class of loans, it overrides the FHA and VA preemptions for that type of loan in the absence of a contrary statement.

C. Statute of Limitations

Although defendants presented a statute of limitations defense in their answers, the issue was neither argued nor addressed in the district court. Defendants argue that these actions are barred because both actions were instituted more than one year after the respective contracts were formed. Although GMVSFA and its penalty provision state no limitations period themselves, defendants suggest that the general one-year statute applying to usury actions contained in O.C.G.A. § 7-4-10(d) applies here as well.[17]

The issue is amendable to prompt resolution in this appeal. The Court agrees that O.C.G.A. § 7-4-10(d) seems to apply in these actions, but disagrees with defendants regarding the effect of this statutory bar. Rather than concluding that this statute acts as a complete bar to actions filed more than a year after contract formation, the courts interpreting the statute have held that it bars only actions to affirmatively recover interest paid more than a year before the action was instituted. *Duderwicz v. Sweetwater Savings Association,* 595 F.2d 1008, 1115 n.11 (5th Cir. 1979); *Reconstruction Finance Corp. v. Puckett,* 181 Ga. 288, 181 S.E. 861 (1935); *Family Home Services, Inc. v. Taylor,* 142 Ga. App. 386, 236 S.E.2d 28

[17]"No plea or action for the recovery of such forfeiture shall be barred by lapse of time shorter than one year." O.C.GA. § 7-4-10(d).

(1977); *Hartsfield Co. v. Watkins*, 67 Ga. App. 411, 20 S.E.2d 440 (1942).

D. Retroactivity

The district court decided that a Georgia statute enacted in 1983 which removes the interest rate ceiling on mobile home installments sales contracts in excess of $3000.00[18] did not apply to these lawsuits filed after the statute's effective date as to contracts executed before that date. If the statute is applied retroactively to loans predating the statute, then plaintiffs would have no cause of action.

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[18]In 1983, the Georgia General Assembly enacted wide-ranging amendments pertaining to interest and usury, some of which relate to mobile home financing. 1983 Ga. Laws 1146. In section 7 (codified at O.C.G.A. § 7-4-20), the legislature exercised its prerogative to override section 501 of DIDMCA for loans, mortgages, credit sales, and advances made in Georgia on or after March 31, 1983. Concurrently, the legislature removed interest rate limits on mobile home retail installment contracts of $3000.00 or more. "Notwithstanding the provisions of subsections (a) through (c) of Code Section 10-1-33, any retail installment contract pertaining to . . . [a]ny manufactured home with a cash sales price of more than $3,000.00 . . . may provide for such finance charge as the parties may agree in writing." Section 2 (codified at O.C.G.A. § 7-4-3(a)). The legislature required, though, that any such contract comply with the DIDMCA regulations. Any person failing to comply with these regulations would be subject to the liability specified in O.C.G.A. § 7-4-5. Section 7-4-5 specifies that the person will be liable for (1) any actual damage sustained by the other person as a result of the failure, as well as (2) twice the amount of any interest or finance charge contracted for in connection with the transaction, "except that the liability under this paragraph shall not be less than $100.00 nor greater than $1,000.00." This liability may only be asserted in an individual action, "provided, however, this provision shall not apply to any class action pending prior to March 31, 1983." Although the amendments provided that O.C.G.A. § 10-1-33 would not apply to mobile home retail installment contracts of $3000.00 or more, section 10-1-33 itself was left unamended.

The Georgia courts now hold unequivocally, in the absence of a savings clause, that repeal of a usury limit operates retroactively to lift the penalty for usury. *See, e.g., Ward v. Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729 (1985); *Fountain v. Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906 (1984); *Dorsey v. West*, 252 Ga. 92, 311 S.E.2d 816 (1984); *Southern Discount Co. v. Ector*, 246 Ga. 30, 268 S.E.2d 621 (1980); *Wasser v. Citizens & Southern National Bank*, 170 Ga. App. 872, 318 S.E.2d 518 (1984). At least one section of the 1983 Act has been held retroactive. In *Ward v. Hudco Loan Co.*, the court held retroactive the amendment to O.C.G.A. § 7-4-2(a)(1).[19]

The district court held, however, that these normal rules of construction cannot apply in this case. In all of the prior cases, the legislature simply abolished the interest limits applying to a particular class of loans. Here, the legislature coupled this removal with a requirement that retail installment contracts comply with certain federal regulations. Although the removal is not "conditioned" *per se* on compliance with the regulations, the legislature obviously intended for there to be a trade-off: in exchange for losing usury law protection, prospective borrowers would receive other consumer protections.

The district court concluded that logically the legislature would have considered these protections no less important for contracts preceding March 30, 1983. Many of these contracts, though, would not contain the federal protections. Moreover, if the legislature attempted to apply the new penalty provisions to pre-1983 Act contracts, the district court thought serious constitutional questions would arise. Rather than applying only part of the new statute to the pre-Act contracts, the district court determined that

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[19] "Notwithstanding the provisions of other laws to the contrary, except Code Section 7-4-18, the parties may establish any rate of interest . . . agreed upon in writing by the parties where the principal amount involved is more than $3,000.00 . . . ." O.C.G.A. § 7-4-2(a)(1).

it is more likely that the Georgia General Assembly intended the "package" to apply only as a whole to loans post-dating the Act's effective date.

Because this question of state law appears to control the outcome of this action and there are no clear controlling precedents in the decisions of the Supreme Court of Georgia, we certify the question to the Supreme Court of Georgia pursuant to Rule 37 of the Rules of the Supreme Court of Georgia.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA PURSUANT TO RULE 37 OF THE SUPREME COURT OF GEORGIA TO THE SUPREME COURT OF GEORGIA AND THE HONORABLE JUSTICES THEREOF.

Question to be Certified

Whether section 2 of 1983 Ga. Laws 1146, O.C.G.A. § 7-4-3(a), which provides that O.C.G.A. § 10-1-33 shall not apply to retail installment contracts pertaining to any manufactured home with a cash sales price of more than $3,000.00, operates retroactively so as to eliminate any cause of action a manufactured home purchaser may have acquired under O.C.G.A. § 10-1-38 by a transaction prior to the 1983 Act's effective date.

The phrasing used in the certified question is not to restrict the Supreme Court's consideration of the issue in its analysis of the record certified in this case. This extends to the Supreme Court's restatement of the issue and the manner in which the answer is given. *See Martinez v. Rodriques*, 394 F.2d 156, 159 n.6 (5th Cir. 1968).[20]

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[20] The Georgia General Assembly amended O.C.G.A. § 10-1-33 in 1985 to add a new subsection (d), effective April 2, 1985: "Notwithstanding

The clerk of the court is directed to transmit this certificate, as well as the briefs and record filed with the court, to the Supreme Court of Georgia and simultaneously to transmit copies of the certificate to the attorneys for the parties.

QUESTION CERTIFIED.

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the provisions of subsection (a) of this Code section, a buyer and a seller may establish any finance charge agreed upon in writing by the parties where the amount financed is more than $5,000.00." § 2, 1985 Ga. Laws 698, 699. None of the parties pointed out this amendment in either their briefs or at oral argument, but the appellee has cited it in a post-argument submission. In considering the issue certified in this case, the Supreme Court of Georgia is, of course, free to consider any effect this 1985 amendment might have on the present cases.

APPENDIX "B"

256 Ga. 790

SOUTHERN GUARANTY CORPORATION et al.

v.

DOYLE et al.

No. 43711.

Supreme Court of Georgia.

March 12, 1987.

The United States Court of Appeals for the 11th Circuit, 795 F.2d 907, certified question to the Georgia Supreme Court concerning whether certain laws relating to interest limits should be applied retroactively to retail installment sales contracts for mobile homes. The Supreme Court, Bell, J., held that: (1) The General Assembly intended usury law amendment to have prospective application only, and (2) usury law subsection, which abolishes interest limits for motor vehicle installment sales contracts in excess of $5,000, did not apply to retail installment contracts for mobile homes.

Question answered.

Wyckliffe A. Knox, Jr., Raymond G. Chadwick, Jr., Wildman, Harrold, Allen, Dixon & Branch, Susan L. Kupferberg, Knox & Zacks, Augusta, Douglas N. Campbell, Laura E. Stevenson, Mitchell, Loggins, Campbell & Elsberry, Atlanta, for Southern Guar. Corp. et al.

John B. Long, Nixon, Yow, Waller & Capers, David E. Hudson, Hull, Towill Norman & Barrett, Thomas W. Tucker, Dye, Miller, Tucker & Everritt, Augusta for Richard Doyle et al.

Hansell & Post, W. Rhett Tanner, Michael J. Templeton, Douglas N. Campbell, Laura E. Stevenson, Kenneth G. Levin, amici curiae.

BELL, Justice.

This case is here by way of certified question from the United States Court of Appeals for the Eleventh Circuit. See Rule 37 of the Supreme Court of Georgia; OCGA § 15-2-9; *Doyle v. Southern Guaranty Corp.*, 795 F.2d 907 (11th Cir. 1986). It concerns the question whether certain laws relating to interest limits should be applied retroactively.

Appellee Doyle purchased a new mobile home from Family Homes Sales Center, Inc., pursuant to a retail installment sales contract dated January 25, 1983. The contract was assigned to appellant Southern Guaranty Corporation. Appellee Jimmy Wood purchased his mobile home on February 25, 1982, under a retail installment sales contract which was assigned to appellant Fort Wayne Mortgage Company.

Doyle and Wood (hereinafter the borrowers) subsequently sued Southern Guaranty Corporation and Fort Wayne Mortgage Company (hereinafter the lenders) under the Georgia Motor Vehicle Sales Finance Act (hereinafter GMVSFA), OCGA §§ 10-1-30 to 38. It is undisputed that both contracts involved here exceeded the maximum rate of interest (10% add-on) then allowed under OCGA § 10-1-33. The borrowers sought forfeiture of finance charges, plus penalties. OCGA § 10-1-38.

1. We will first discuss certain of the lenders' defenses which have been handled adversely to them by the Eleventh Circuit. Although our discussion is not necessary, strictly speaking, to a resolution of the question certified to this court, it will provide the reader with a better understanding of the case.

The lenders defended in reliance, inter alia, on certain federal preemption statutes which exempt mobile home financing contracts from state usury laws if the contracts include consumer protections specified by the preemption statutes. There are three preemption statutes which are relevant here: the FHA,[1] the VA,[2] and section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (hereinafter DIDMCA).[3] However, none of these statutes exempts the lenders in the instant case from the financing limits of OCGA § 10-1-33.

Doyle's contract is an FHA-insured agreement; Woods is a VA-insured agreement. Doyle's and Wood's contracts do contain the necessary FHA and VA consumer protections, but the Eleventh Circuit has held that, notwithstanding the inclusion of those protections, the lenders cannot avail themselves of either preemption statute. The reason, according to the Eleventh Circuit, is that when our General Assembly amended OCGA § 10-1-33 in 1980 (raising the interest rate limit from 8% add-on to 10% add-on), it invoked other provisions of the FHA and VA preemption statutes which under certain circumstances permit the states to override the FHA and VA preemptions. See *Doyle v. Southern Guaranty Corp.*, supra, 795 F.2d at 912-914.

The lenders' mobile home contracts also fall under DIDMCA, but it is undisputed that the contracts do not contain the consumer protections required by DIDMCA. Therefore, DIDMCA does not exempt those contracts from § 10-1-33.

2. For purposes of the certified question, the lenders' pertinent defense was that the 1983 amendment of OCGA

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[1] 12 U.S.C. § 1735f-7.

[2] 38 U.S.C. § 1828.

[3] 12 U.S.C. § 1735f-7 note.

§ 7-4-3, effective March 31, 1983,[4] eliminated the causes of action of Doyle and Wood, even though they entered into their contracts before the amendment's effective date.

With regard to this defense, the Eleventh Circuit has certified the following question to us: "Whether [the 1983 amendment to OCGA § 7-4-3(a)], which provides that OCGA § 10-1-33 shall not apply to retail installment contracts pertaining to any manufactured home with a cash sales price of more than $3,000.00 [which the contracts in question exceeded] operates retroactively so as to eliminate any cause of action a manufactured home purchaser may have acquired under OCGA § 10-1-38 by a transaction prior to the 1983 Act's effective date." *Doyle v. Southern Guaranty Corp.*, supra, 795 F.2d at 915-916.

The Eleventh Circuit also added that we are free to consider what effect, if any, a 1985 amendment to OCGA § 10-1-33, which added a new subsection (d), see 1985 Ga.Laws, 698, 699, might have on the present case. *Doyle*, supra, 795 F.2d at 916, fn. 20. New subsection (d) provides that notwithstanding subsection (a) of § 10-1-33, "a buyer and a seller may establish any finance charge agreed upon in writing by the parties where the amount financed is more than $5,000.00."

3. The lenders, relying on *Ward v. Hudco Loan Company*, 254 Ga. 294, 328 S.E.2d 729 (1985); *Fountain v. Dixie Finance Corp., 252 Ga. 543, 314 S.E.2d 906 (1984); and Southern Discount Co. v. Ec'or*, 246 Ga. 30, 268 S.E.2d 621 (1980) contend that the 1983 amendment to OCGA § 7-4-3 should be applied retroactively to defeat Doyle's and Wood's causes of action.

We agree with the lenders that the above cases establish a general rule that the repeal of usury limits should be construed liberally so as to give lenders relief if possible. This is so because forfeitures and penalties are not favored

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[4]See 1983 Ga.Laws, 1146, § 2.

and because the defense of usury does not go to the merits of and is not a bargained-for-element of the contract, but is instead a privilege belonging to the remedy, given to the borrower by statute. *Ward v. Hudco Loan Co.*, supra, 254 Ga. at 297, 328 S.E.2d 729; *Fountain v. Dixie Finance Co.*, supra, 252 Ga. at 543–544, 314 S.E.2d 906; *Southern Discount Co. v. Ector*, supra, 246 Ga. at 30–31, 268 S.E.2d 621. The lenders, however, do acknowledge that the issue of retroactivity of law is "at last and always a question of legislative intent." *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 103(1), 317 S.E.2d 189 (1984).[5]

In the instant case, we find that there is a clear legislative intent that the 1983 amendment of OCGA § 7–4–3(a) should not be applied retroactively. From the time the DIDMCA preemption became effective in 1980 until March 31, 1983, the effective date of the amendment of OCGA § 7–4–3(a), two categories of lawful interest rates existed in Georgia. One was based on the 1980 amendment of OCGA § 10–1–33 setting the maximum lawful rate of interest at 10% add-on; under it a lender had to charge 10% add-on or less, but was not required to give the consumer protections required by DIDMCA. The other category was based on DIDMCA; under it a lender could charge in excess of 10% add-on if it provided the consumer protection benefits required by DIDMCA. If the consumer protections were not provided, then the lender would lose the DIDMCA preemption and would be subject to the interest limits of OCGA § 10–1–33.

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[5]We note that a savings clause is not a prerequisite to the prospective application of a law repealing a usury limit. Language to that is contained in a quote from *Ewell v. Daggs*, 108 U.S. 143, 150–151, 2 S.Ct. 408, 413–414, 27 L.Ed. 682 (1883), first appearing in *Fountain v. Dixie Finance*, supra, 252 Ga. at 543–544, 314 S.E.2d 906. However, none of the cases by this court determining the retroactivity of the repeal of usury limits have turned on absence of a savings clause. See *Ward*, supra, 254 Ga. 294, 328 S.E.2d 729; *Fountain v. Dixie Finance Co.*, 252 Ga. 543, 314 S.E.2d 906 (1984); *Southern Discount Co. v. Ector*, 246 Ga. 30, 268 S.E.2d 621 (1980).

With the amendment of OCGA § 7-4-3(a) in 1983 the General Assembly abolished the interest limits applying to mobile home loans in excess of $3,000. OCGA § 7-4-3(a)(1). This removal of interest limits, however, was coupled with the requirement that lenders provide consumers the protections required by DIDMCA. OCGA § 7-4-3(b)(1). Although the removal of the ceiling on interest rates was not, like DIDMCA, dependent upon compliance with the DIDMCA regulations (instead, noncompliance is sanctioned by the liability specified in § 7-4-5), "the legislature obviously intended for there to be a trade-off: in exchange for losing usury law protection, prospective borrowers would receive other consumer protections." *Doyle v. Southern Guaranty Corp.*, supra, 795 F.2d at 915.

None of the previous cases relied on by the lenders dealt with legislation with such a trade-off. Moreover, we find this trade-off indicative of the legislative intent regarding the retroactivity *vel non* of the relevant provisions of the 1983 amendment to § 7-4-3. If we were to adopt the lenders' position and apply OCGA § 7-4-3(a)(1), as amended in 1983, retroactively, a third category of permissible loan contracts would be created for the period preceding March 31, 1983. Under it a lender could charge in excess of 10% add-on for loans in excess of $3,000 and the consumer would not be entitled to the protections of DIDMCA. Obviously, the General Assembly, in amending § 7-4-3 in 1983, considered the DIDMCA protections important enough to require lenders to include them in mobile home contracts in excess of $3,000. Logically, the General Assembly would have considered the DIDMCA protections no less important during the period preceding March 31, 1983. It would therefore be unreasonable to conclude that the General Assembly intended to retroactively approve a class of loans with unlimited interest and no DIDMCA protections. Because we should not, in determining legislative intent, ascribe to the legislature an unreasonable intention, e.g., *City of Jesup v. Bennett*, 226

Ga. 606(2), 176 S.E.2d 81 (1970), we conclude that the General Assembly intended for §§ 7-4-3(a)(1) and (b)(1), as amended in 1983, to have prospective application only.

We next consider the lenders' argument that the new subsection (d) added to OCGA § 10-1-33 in 1985 should be applied retroactively to defeat the borrowers' causes of action. As previously noted, new subsection (d) of § 10-1-33 abolishes the interest limits for motor vehicle installment sales contracts in excess of $5,000, notwithstanding the limit provisions of § 10-1-33(a). The lenders argue that since the removal of interest limits under new subsection (d) was not coupled with the grant of DIDMCA protections, no reason exists not to apply new subsection (d) retroactively. We disagree.

The provisions of the GMVSFA, of which § 10-1-33 is a part, apply to motor vehicles. The GMVSFA has been applied to mobile homes because of the judicial construction given to the definition of "motor vehicle" appearing at OCGA § 10-1-31(a)(4). E.g. *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973).

The General Assembly, however, by amending OCGA § 7-4-3 in 1983 created laws which specifically apply to *mobile home* retail installment contracts. As previously noted, OCGA § 7-4-3(a)(1) removes the interest limit for mobile home installment sales contracts in excess of $3,000, while § 7-4-3(b)(1) requires lenders for such contracts to grant consumers the protections of DIDMCA. Moreover, the 1983 amendment to § 7-4-3 distinguishes between mobile home contracts and motor vehicle contracts. The amendment abolishes the interest limit on *motor vehicle* loans in excess of $5,000, § 7-4-3(a)(2),[6] and only extends the consumer protection of DIDMCA to mobile home in-

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[6]We note that new subsection (d) of § 10-1-33, as enacted in 1985, is identical to § 7-4-3(a)(2), as amended in 1983.

stallment sales contracts and not to motor vehicle installment sales contracts, § 7-4-3(b)(1).

Since the General Assembly, beginning in 1983, has distinguished between mobile home loans and motor vehicle loans, and since §§ 7-4-3(a)(1) and (b)(1), as amended in 1983, deal specifically with mobile home installment sales contracts, whereas § 10-1-33(d), as amended in 1985, does not, we conclude that OCGA §§ 7-4-3(a)(1) and (b)(1) express the controlling legislation and legislative intent on mobile home installment sales contracts in excess of $3,000. Moreover, we note that the retroactive application of new subsection (d) of OCGA § 10-1-33 to mobile home installment contracts would defeat the legislative intent, discussed in Division 3, supra, of the 1983 amendment of OCGA § 7-4-3, which couples the abolishing of interest limits on mobile homes with the granting of consumer protections. For the foregoing reasons, the lenders' reliance of § 10-1-33(d), as amended, fails.

5. In addition to the foregoing, we conclude that OCGA § 10-1-36.1, added to GMVSFA in 1985, see 1985 Ga.Laws at 699, also expresses an intent by the General Assembly that neither the 1983 amendment of OCGA § 7-4-3, nor the addition of new subsection (d) to § 10-1-33 in 1985 (assuming it did apply to mobile home loans, see division 4, supra) was intended to apply retroactively. OCGA § 10-1-36.1(a) bars all class actions for violation of GMVSFA, but subsection (b) exempts from this bar all class actions involving mobile homes pending as of February 22, 1985. If the General Assembly had intended for either the 1983 amendment to § 7-4-3 or the 1985 addition of new subsection (d) to § 10-1-33 to apply retroactively, the inclusion of the exemption in OCGA § 10-1-36.1 for class actions pending on February 22, 1985, would have been unnecessary, for such class actions would have been abolished by the retroactive application of those laws.

6. For the reasons expressed above, we answer the certified question in the negative and conclude that new subsection (d) of § 10-1-33 is of no avail to the lenders.

Certified Question Answered.

All the Justices concur.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 85-8187, 85-8297.

Richard DOYLE, Plaintiff-Appellee,
v.
SOUTHERN GUARANTY CORPORATION, Defendant-Appellant.

Jimmy E. WOOD, Plaintiff-Appellee,
v.
FORT WAYNE MORTGAGE CO., Defendant-Appellant.

June 5, 1987.

Appeals from the United States District Court for the Southern District of Georgia; Dudley H. Bowen, Jr., Judge.

Before RONEY, chief Judge, CLARK, Circuit Judge, and FAIRCHILD*, Senior Circuit Judge.

PER CURIAM:

These cases came to this Court on a 28 U.S.C.A. § 1292(b) appeal of legal questions decided by the district court in denying defendants' motions for dismissal for failure to state a cause of action and summary judgment. These are diversity actions in which the plaintiffs-borrowers claim a cause of action under state usury laws, and the defendants-lenders assert various defenses including preemption by certain federal statutes.

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*Honorable Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

This court decided three points in controversy, and certified a fourth question of state law to the Supreme Court of Georgia. *Doyle v. Southern Guar. Corp.*, 795 F.2d 907 (11th Cir. 1986). The Georgia court has now answered the question certified. *Southern Guaranty Corp., et al., v. Doyle, et al.*, 256 Ga. 790, 353 S.E.2d 510 (Ga.1987). The denial of defendants' motions to dismiss for failure to state a cause of action and summary judgment is due to be affirmed under the decisions made in those two opinions.

Although the appellants by supplemental brief seek the answers to other questions not presented by their motions and not addressed by the trial court, it is quite apparent that it would be inappropriate for this Court to express any opinion thereon. Appellants' attorneys have overlooked the fact that this is an interlocutory appeal from a denial of a motion to dismiss, while *Quiller v. Barclays American/ Credit Inc.*, 764 F.2d 1400 (11th cir. 1985) (*en banc*), upon which they rely, was an appeal from a final judgment granting a motion to dismiss, in which the district court was reversed.

AFFIRMED and REMANDED.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

JIMMY E. WOOD,	*	CIVIL ACTION
	*	CV184-204
Plaintiff	*	
	*	
vs.	*	
	*	
FORT WAYNE MORTAGE COMPANY,	*	
	*	
Defendant	*	

Filed
March 13, 1985

ORDER

Before the Court are defendant's motion to dismiss and motion for summary judgment. Plaintiff has opposed the motion. The Court heard oral argument on March 7, 1985.

As the parties admitted at oral argument, to grant defendant's motions would be to require reconsideration of the order in *Doyle v. Southern Guaranty,* CV184-180 (S.D. Ga. Jan. 15, 1985), something I am not inclined to do at this juncture. Accordingly, the Court DENIES defendant's motion to dismiss and motion for summary judgment.*

The Court tentatively certifies the class. The magistrate's order denying defendant's motion for a protective order staying discovery is AFFIRMED.

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*As in *Doyle*, I am of the opinion that this "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

ORDER ENTERED at Augusta, Georgia, this 13th day of March, 1985.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

(For the convenience of the Court, a copy of the opinion in *Doyle v. Southern Guaranty*, CV 184-180 (S.D. Ga. Jan. 15, 1985) is attached as Appendix "E")

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

RICHARD DOYLE, ET AL.,	)	CIVIL ACTION NO. CV184-180
Plaintiff,	)	
vs.	)	
SOUTHERN GUARANTY CORPORATION,	)	
Defendant.	)	

Filed
January 15, 1985

ORDER ON APPEAL AND PENDING MOTIONS

Plaintiff instituted this action on October 3, 1984. He asserts claims on his own behalf and for others similarly situated for relief from excessive finance charges on mobile home sales contracts that violate the Georgia Motor Vehicle Sales Finance Act. (GMVSFA). O.C.G.A. §10-1-30-38. Served with the complaint were interrogatories, requests for production of documents, and a motion for class certification.

Defendant, which financed plaintiff's mobile home purchase, answered the lawsuit on October 25, 1984. Plaintiff's motion for certification of the class was tentatively granted by an order of November 2, 1984.

On November 13, 1984, defendant filed motions to dismiss the lawsuit, for summary judgment, to deny class certification, and for a protective order and stay of discovery. The discovery motion was denied by the Magis-

trate, and that denial has been appealed to this Court. Pending the appeal, defendant filed objections to the discovery instituted by plaintiff. Plaintiff has filed a motion to compel answers to the interrogatories and for production of documents, and that motion is also before the Court.

A hearing was conducted on the pending motions on January 7, 1985. Rulings from the bench were made on some of the motions at the conclusion of the hearing. This order will supplement those rulings and address the matters remaining for decision.

I. 1979 VERSUS 1980 PREEMPTION

In support of its summary judgment motion, defendant asserts that the mobile home sales contract with the named plaintiff was preempted from state limits on interest rates or finance charges by 12 U.S.C. §1735f-7 which was enacted as a part of the Housing and Community Development Amendments of 1979, Pub.L. No. 96-153, December 21, 1979. The effect of this legislation was to preempt state laws limiting interest rates or finance charges on any loan "which is insured under Title I or Title II of [the National Housing Act]." Defendant has submitted an affidavit from its president showing that the Doyle loan is insured by the Federal Housing Administration under title I of the National Housing Act.[1]

Plaintiff's response to defendant's reliance on the 1979 legislation is based on the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, §501, 94 Stat. 161, 12 U.S.C.A. §1735f-7 note (West, 1980). (The "1980 Preemption Act"). This legislation was enacted on March 31, 1980. Plaintiff contends

[1]Because of defendant's opposition to discovery, plaintiff has not had the opportunity to challenge the assertions made in defendant's supporting affidvait. For the purposes of the present ruling, the facts stated in the affidavit of Daniel E. Winters will be treated as having been established.

that it is controlling insofar as any loan secured "by a first lien on a residential manufactured home" (mobile home). 1980 Preemption Act, §501(a)(1)(A). For the time period at issue in this case, the Court agrees.

The legislation of December, 1979 broadly preempted state usury laws for any loan insured under title I and II of the National Housing Act. While the legislation did not expressly mention mobile homes, mobile home loans could be included along with the many other types of loans which can be insured under that Act. *See* 12 U.S.C.A. §1703(b) for mobile home loans. The 1980 Preemption Act freed even more types of federally related loans from state usury limitations (§501(a)(1)(C)), and for the first time also contained specific dictates from Congress about preemption of interest rates on mobile home loans.

Unlike the 1979 legislation, the 1980 Act specifically addressed mobile homes, and conditioned the preemption of state usury laws on the requirement that "the terms and conditions" of such a loan comply with consumer protection provisions prescribed by the Federal Home Loan Bank Board (FHLBB). §501(c). In addition, the legislation plainly indicates that Congress intended these requirements to apply even to a mobile home otherwise insured under the National Housing Act. Congress was careful to include definitions in the 1980 Act that would encompass mobile home loans insured under the National Housing Act. §501(a)(1)(C)(ii-iv)). This conclusion is confirmed by the legislative history found in the conference report on this legislation reprinted at 1980 *U.S. Code Cong. & Ad. News* 308, 309.

In a supplemental brief, defendant submitted a copy of a letter from the assistant Secretary of the Department of Housing and Urban Development which discusses to some extent the applicability of the 1979 and 1980 Preemp-

tion Acts in regard to "Title I manufactured home loans."[2] In this letter, the Assistant Secretary merely points out that for a state's usury limits to apply again to a Title I mobile home loan, a state would have to exercise the prerogative granted by Congress to override both the 1979 and the 1980 Acts. Nothing in the letter indicates that a lender is free to disregard the consumer protection benefits in the 1980 Act in a state which has not overridden the Act by subsequent state law. The letter does acknowledge that the 1980 Act applies to FHA insured mobile home loans.

This Court finds in the 1980 legislation an unmistakable intent on the part of Congress to require mobile home loans in states which have not overridden the 1980 Act to afford the consumer protection provisions stated in the legislation and adopted by the FHLBB. Congress was careful to make the 1980 Act applicable not only to mobile home loans in general, but also to mobile home loans insured under the National Housing Act. Therefore, those loans must include the consumer protection provisions required by §501(c) to preempt state law regardless of whether they would otherwise qualify for preemption under the 1979 legislation.[3]

The 1980 Preemption Act was both the latest expression of Congress and the only specific legislation concerning the preemption of state interest rates on mobile home transactions. A "specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (1980). The conditioning of interest rate preemption upon the grant to mobile home borrowers of consumer protection benefits

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[2]Letter from Maurice L. Barksdale to all approved title I lending institutions, March 2, 1984, TI-352.

[3]Defendant was evidently aware to some extent of the need to comply with the FHLBB regulations. Its form contract used in the Doyle transaction twice makes reference to those regulations at 12 C.F.R. §590.4.

not otherwise found in the law was the obvious intent of Congress. Where the "language employed by the Legislature is plain and free of all uncertainty, . . . the statute speaks its own construction." *Barnes v. Philadelphia & Reading Railroad Company*, 84 U.S. 294 (1873). That is the situation here.

Defendant has not rebutted plaintiff's contention that the Doyle loan charged interest at a rate in excess of the maximum permitted by the GMVSFA. Defendant has not rebutted the contention that the sales contract failed to comply with the consumer protection regulations necessary to preempt the GMVSFA. Defendant's summary judgment motion is therefore denied.

II. THE 1983 AMENDMENTS TO THE GEORGIA USURY STATUTES

Plaintiff contends that the interest rate on his mobile home contract exceeds the 10% add-on limit in the GMVSFA. O.C.G.A. §10-1-3. In Georgia, mobile homes are governed by that Act. *Smith v. Society National Bank*, 141 Ga.App. 19, 20, 232 S.E.2d 367 (1977).

In the 1983 session of the Georgia General Assembly, the usury chapter of the Georgia Code was *amended*[4] to be effective March 31, 1983. Georgia Laws 1983, pp. 1146-1153. In Section 2 of this legislation the General Assembly provided that notwithstanding the GMVSFA, loans for mobile homes with a cash price of more than $3,000 "may provide for such finance charges as the parties may agree." In addition, the legislation required that such contracts afford to the borrowers the "contract provisions required by subsection (c) of Section 501 of [the 1980 Preemption Act]." A loan not providing those consumer protections in

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[4]It is important to note that this statute was amended, not repealed, as have been some other usury provisions. Such amendments are usually considered prospective in their effect.

the contract would be subject to a fine from $100 to $1,000. *Id.* at 1149, 1151; O.C.G.A. §7-4-3, §7-4-5(a)(2). Also in this legislation, Georgia acted to override the preemption contained in §501 of the 1980 Preemption Act effective March 31, 1983.

The defense raised is that this legislation operates retroactively and limits to $1,000 any penalty for a loan made in excess of the limits allowed by the GMVSFA and without compliance with the consumer protections required by the 1980 Preemption Act. Under that theory, the amount in controversy for each class member would be less than the amount necessary to maintain diversity jurisdiction in this Court.

In construing Georgia legislation, "It is the duty of the courts to look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil and the remedy." *Tomlinson v. Sadler,* 99 Ga.App. 482, 484 (2), 109 S.E.2d 84 (1959). The court must not construe a statute to cause it to "result in unreasonable or absurd consequences not contemplated by the legislature." *New Amsterdam Casualty Co. v. Freeland,* 216 Ga. 491, 495, 117 S.E.2d 538 (1960). "The construction must square with common sense and sound reasoning." *Blalock v. State,* 166 Ga. 465, 470, 143 S.E. 426 (1928). It is also the general rule in Georgia that "laws prescribe only for the future." O.C.G.A. §1-3-5. Georgia courts will not give retroactive interpretation to statutes unless there is express or imperative language in the enactment which mandates that result. *Wilmouth v. Henry County,* 251 Ga. 643, 644, 309 S.E.2d 126 (1983); *Hart v. Owens-Illinois, Inc.,* 250 Ga. 397, 398, 297 S.E.2d 462 (1982); *Cox v. Schweiker,* 684 F.2d 310, 318 (5 Cir. 1982). Applying these principles, the Court cannot accept the interpretation advanced by defendant.

Once the 1980 Preemption Act was enacted, two categories of lawful interest rates existed in Georgia until

March 31, 1983. The first category was for any loan that charged 10% or less add-on interest for a new mobile home according to the GMVSFA. The second category was for any loan on a new mobile home with an interest rate greater than 10% add-on but which gave the consumer protection benefits required by the 1980 Preemption Act and the FHLBB regulations. The categories for new mobile home loans were changed by the Georgia legislation of 1983. Beginning March 31, 1983, as a matter of state law a loan of over $3,000 for a mobile home could charge any rate of interest but was required to give the consumer protection benefits which had been created by the 1980 Preemption Act. Defendant's argument is that the 1983 legislation would have the additional effect of validating a third category of loans during that period of April 1 1980, through March 30, 1983. That would be a category of loans charging in excess of 10% add-on interest but not affording the consumer protection benefits required by federal law. That is a construction which this Court finds to be at odds with the obvious intent of the General Assembly.

Since the General Assembly deemed it important enough to condition the lifting of usury limits for mobile home loans in excess of $3,000 with the concurrent granting of consumer protection benefits when it passed the legislation in March of 1983, it is only logical that the General Assembly would have considered those protections no less important during the period of April 1, 1980 through March 30, 1983. The General Assembly is presumed to have enacted the 1983 legislation "with full knowledge of the existing condition of the law and with reference to it," including existing federal law. *Hadley v. Board of Trustees of Employees Retirement System,* ____Ga.App. ____, *320 S.E.2d 620 (1984).*

The language chosen by the General Assembly in the 1983 law to allow higher interest rates on mobile home loans of more than $3,000 shows in yet another way that

the law would have to apply prospectively only. The relief from interest and finance charge limits is expressed in terms of what the parties "may agree." A legislative enactment in March of 1983 could not create a meeting of the minds between parties who completed their contract two months earlier. What parties "may" do implies future conduct only.

Defendant relies on several cases which stand for the proposition that the General Assembly may repeal a usury-type provision and in so doing prevent a borrower form asserting a claim of usury for a transaction entered prior to the repeal but on which suit is not brought until after the effective date of the repealing legislation. *See, e.g., Fountain v. Dixie Finance Corporation of Georgia, Inc.*, 252 Ga. 543, 314 S.E.2d 906 (1984); *Wasser v. C&S Bank*, 170 Ga.App. 872, 318 S.E.2d 518 (1984). Both of these cases concerned claims of excessive finance charges under the Georgia Second Security Deed Act which had been repealed by the General Assembly by the time of each suit.[5] The holding of these cases is not applicable here.

Initially, analysis shows a clear intent by the General Assembly to apply the 1983 legislation prospectively. To do otherwise would be to adopt unreasonable and absurd results which were not intended. In addition, the 1983 legislation at issue here did not repeal the underlying GMVSFA. Georgia Laws 1983, pp. 1148-49. After March 31, 1983, the GMVSFA remained on the books and applicable to sales of mobile homes with cash prices of $3,000

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[5]Defendant also relies upon *Dorsey v. West*, 252 Ga. 92, 311 S.E.2d 816 (1934). That case involved a somewhat different issue that arose from the same repeal of the Georgia Second Security Deed Act. In *Dorsey*, the question was whether repeal of the statute applies to a case already in litigation. The Supreme Court held that where a case was in litigation and the issue of liability had been determined, a subsequent repeal did not deprive a borrower of the defense of usury. Dicta in footnote 4 of the opinion indicates that repeal of such an act would not effect even pending actions.

or less. The matter presently before the Court does not concern a repeal, but rather new legislation which can only be applied reasonably to transactions occurring after its enactment.[6]

The Court finds that it does have subject matter jurisdiction. Consequently, the defendant's motion to dismiss is denied.

III. CLASS ACTION ISSUES

Defendant has moved the Court to revoke the tentative determination that the case should proceed as a class action. Defendant's argument is based upon its assertion that the 1979 Preemption Act rather than the 1980 Preemption Act is controlling on this loan, and also upon the argument that the 1983 Georgia legislation applies retroactively. These arguments have previously been rejected in this order, and the same results obtain for the challenge to class certification.

Another challenge against the case proceeding as a class action is based upon Section 4 of Georgia Laws 1983, pp. 1146, et seq. which is now codified at O.C.G.A. §7-4-5(b). This is an anti-class action provision pertaining to the penalties imposed in this legislation for not affording consumer protection provisions to borrowers on mobile home loans. For the same reasons previously discussed, this Court finds that this provision was intended to apply prospectively only to loans after March 30, 1983. Even if this were not so, the maintenance of a case as a class action is a matter of federal procedural law which is controlling over state law provisions to the contrary under the ra-

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[6]For cases applying preexisting usury laws which were only amended rather than entirely repealed by subsequent litigation, see *Maynard v. Marshall*, 91 Ga. 840, 18 S.E. 403 (1893); *Long v. Gresham*, 148 Ga. 170, 174, 96 S.E. 211 (1918); *Lankford v. Holton*, 187 Ga. 94, 98, 200 S.E. 243 (1938). *Cf. Lindenberg v. First Federal Savings & Loan*, 691 F.2d 974, 975 (11 Cir. 82) [sic].

tionale of *Hanna v. Plumer*, 380 U.S. 460 (1965). *See* 3B *Moore's Federal Practice*, ¶23.02[5], pp. 23-79.

Defendant's motion to deny class action status to this case is denied.

IV. DISCOVERY ISSUES

Defendant has moved for a stay of discovery and has objected to discovery on the grounds that it will prevail on its motion to dismiss or for summary judgment and that discovery would therefore be unnecessary. Since the Court has ruled against defendant on these contentions, it will deny defendant's discovery motions which are based on the same grounds.

Defendant has also objected to discovery on grounds of work-product privilege, attorney-client privilege, relevance, and undue burden. All of these objections have been stated as generalities and without any factual showing. The work product privilege requires such a showing before it will be recognized. *Coastal Corporation v. Duncan*, 86 F.R.D. 514, 522 (D. Del. 1980). The proper assertion of the attorney-client privilege requires an affidavit identifying the documents and circumstances which would justify the recognition of the privilege. *Coastal Corporation, supra.* at 520-21; *Bar Marine Products Co., Inc. v. Borg-Warner*, 84 F.R.D. 631, 633 (E.D. Pa. 1979); *Virginia Electric & Power Co. v. Sun Ship Building and Dry Dock Co.*, 68 F.R.D. 397, 401 (E.D. Va. 1975). A general assertion that discovery would be irrelevant, burdensome or oppressive is "vague and conclusory" and therefore insufficient. *Scott v. Courtesy Inns, Inc.*, 472 F.2d 563, 564 (5 Cir. 1973); 4A *Moore's Federal Practice*, ¶33.27, pp. 33-164-168. The Court grants plaintiff's motion to compel discovery over these objections.

Plaintiff has also moved the Court to impose sanctions and the expenses of its motion to compel. The Court will hold those requests in abeyance and will give final con-

sideration to them in light of the ability of the parties to proceed with discovery from this point on without undue delay and in accordance with the Federal Rules of Civil Procedure. The Court does order that defendant reply to plaintiff's interrogatories and produce the documents requested in Augusta within twenty days of the *date* of this order.

IV. CONCLUSION

The Court denies defendant's motion for summary judgment, motion to dismiss, motion to deny class action certification, and motion for a stay of or protective order from discovery. The Magistrate's denial of a stay of discovery is affirmed.

The Court grants plaintiff's motion to compel discovery, and orders defendant to answer interrogatories and produce documents within twenty days. Ruling is reserved on plaintiff's motion for sanctions or expenses.

ORDER ENTERED at Augusta, Georgia, this 15th day of January, 1985.

/s/Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

RICHARD DOYLE,	*	CIVIL ACTION
	*	CV184-180
Plaintiff	*	
	*	
vs.	*	
	*	
SOUTHERN GUARANTY CORPORATION,	*	
	*	
	*	
Defendant	*	

Filed
February 13, 1985

ORDER

Before the Court is defendant's motion to amend the order of January 15, 1985, so as to allow application for interlocutory appeal. The Court GRANTS the motion in part and DENIES the motion in part. The motion is denied to the extent that it seeks a stay of the proceedings in this Court.

The order of January 15, 1985, is hereby amended to include the following paragraph:

> The Court is of the opinion that this order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.
> ORDER ENTERED at Augusta, Georgia, this 13th day of February, 1985.
>
> /s/ Dudley H. Bowen, Jr.
> UNITED STATES DISTRICT JUDGE

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8187

D.C. Docket No. 184-180

RICHARD DOYLE,

Plaintiff-Appellee,

versus

SOUTHERN GUARANTY CORPORATION,

Defendant-Appellant.

No. 85-8297

D.C. Docket No. 184-204

JIMMY E. WOOD,

Plaintiff-Appellee,

versus

FORT WAYNE MORTGAGE CO.,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Georgia

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Before RONEY, Chief Judge, CLARK, Circuit Judge, and FAIRCHILD*, Senior Circuit Judge.

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*Honorable Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District court in these causes be and the same are hereby, AFFIRMED; and that these causes be and the same are hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 5, 1987
For the Court: Miguel J. Cortez, Clerk
ISSUED AS MANDATE: JUNE 30 1987
By: /s/David Maland
Deputy Clerk

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

JIMMY E. WOOD	)	CIVIL ACTION
Plaintiff,	)	File No. 184-204
	)	
vs.	)	
	)	
FORT WAYNE MORTGAGE COMPANY	)	
Defendant	)	

AFFIDAVIT OF LOUIS C. GASPER

I, Louis C. Gasper, being duly sworn, do hereby state:

1. I am Executive Vice President of the Government National Mortgage Association (hereinafter "GNMA"), a wholly owned government corporation within the Department of Housing and Urban Development (hereinafter "HUD"). I have performed the duties of chief operating officer of GNMA since February 19, 1985. Before I assumed my current position, I was Executive Assistant to the President of GNMA. I served in this capacity from August 1981 to February 19, 1985. Between March 1981 and August 1981, I was an economist for the United States Senate Committee on Finance. Between 1975 and 1981, I was the minority staff economist for the United States House of Representatives Committee on Banking, Finance and Urban Affairs. Between 1973 and 1974, I was president of a financial analysis firm. Between 1968 and 1973, I was an assistant professor of economics at the University of Arizona in Tucson. I received my Ph.D. in economics from Duke University in 1969.

2. In my capacity as Executive Vice President of GNMA, I am responsible for and am fully familiar with the operation of the GNMA Mortgage-Backed Securities Program (the "MBS Program") authorized under Section 306(g) of the National Housing Act, as amended, 12 U.S.C. 1721(g), and implemented through regulations published at 24 CFR 390 and by the GNMA I and GNMA II Mortgage-Backed Securities Guides.

3. The purpose of the MBS Program is to provide a security that attracts capital investment into housing. Traditionally, many investors have preferred not to hold federally-insured or guaranteed mortgages which are usually for moderate income families acquiring lower-priced housing. Their reluctance has been based on the small denominations, comparative risks, paperwork, cumbersome servicing requirements and legal complexities of mortgage ownership. To circumvent these obstacles to investment in the housing sector, Congress enacted legislation permitting private lenders to issue securities backed by groups, or pools, of mortgages insured by the Federal Housing Administration (FHA) or guaranteed by the Veterans Administration (VA) or the Farmers Home Administration (FmHA). However, as the Federal Insurance or guaranty alone does not cover 100% of the loss incurred due to a default under a mortgage, Congress authorized GNMA to guarantee the timely payment of principal and interest on the securities and backed this guaranty by the pledge of the full faith and credit of the United States Government.

4. Mortgage-backed securities are created through a process that begins when a financial institution, generally a mortgage banker, applies to GNMA for approval to issue securities. Mortgage bankers generally are thinly capitalized and need to borrow to fund their operations. They normally do not retain mortgages for their own account. If a first-time applicant is an FHA-approved mortgagee in good standing and a GNMA or FNMA servicer, the most important criterion for approval is the issuer's net worth.

If GNMA grants a commitment to guarantee securities, the issuer borrows money from a so-called warehouse lender and proceeds to originate or acquire a pool of FHA insured or VA or FmHA guaranteed mortgage loans to provide the base and backing for the securities. The issuer is required to obtain a document custodian to maintain possession of the mortgages and other loan documents. The issuer must also establish custodial accounts for the collection of both principal and interest and the mortgagors' advance payments of taxes and insurance premiums. Upon receipt of appropriate confirmation that the required documents have been deposited with a document custodian and the appropriate accounts have been established, GNMA approves the issuance of securities, which are sold over-the-counter in denominations of $25,000 or more.

5. The relationship between GNMA and the issuer is contractual and is established when the issuer signs the guaranty agreement for the particular pool for which securities are to be issued. This is prior to the issuance of securities. Once securities are issued, the issuer services the pooled mortgages and performs the other pool administration functions prescribed in its guaranty agreement with GNMA. Breaches of the agreement which constitute an event of default by the issuer are enumerated in Article 8 of the agreement.

6. The combination of a security based on federally-insured or guaranteed mortgages and backed by the full faith and credit of the United States Government has resulted in a high yield, and virtually risk-free investment that has proven to be extremely popular. During the first year of the MBS Program (1970), GNMA approved the issuances of approximately $470 million in mortgage-backed securities. Today, the cumulative amount of securities issued has reached over $220 billion. The securities have become so popular because the MBS Program makes it unnecessary for securities holders to bear the traditional burdens associated with ownership of whole mortgages. In

addition, the Program provides sufficient income, through servicing fees, to the issuers of the securities to make it worthwhile for them to originate and service the loans for the life of the mortgage pools. By protecting the quality of mortgage-backed securities as an investment through the contractual obligations it imposes upon the issuers, GNMA assures the continuation of federally-insured or guaranteed mortgages for individuals purchasing homes.

7. The MBS Program is of critical importance to moderate income families. The Program provides over two-thirds of the funds made available for single-family mortgages insured by FHA. Described as the most important innovation in the secondary mortgage market in the past 40 years, the MBS Program has helped over the past 15 years to provide the funds necessary to house millions of American families that would have found it difficult to qualify for conventional loans.

8. The MBS Program and its success is not limited only to securities backed by pools of single-family mortgages. The Program includes securities which are backed by manufactured home loans, project loans, construction loans, graduated payment mortgages, growing equity mortgages and adjustable rate mortgages.

9. An issuer of GNMA securities backed by manufactured home loans is responsible for originating or acquiring eligible loans, creating a pool of such loans to be held by a custodian, issuing the securities, arranging for the marketing of the securities, servicing the loans in the pool, administering the securities outstanding and making the full and timely payment of all amounts due to securities holders. The issuer must be an FHA-approved Title I lender in good standing.

10. Each loan in a pool must be secured by a manufactured home unit or by a manufactured home unit and a developed manufactured home lot acquired in a single transaction. Each pool must have an aggregate principal

balance of at least $500,000 as of the date of issue. Loans placed in pools must, among other things, have been accepted for insurance by FHA under Title I of the National Housing Act, or have been accepted for guaranty by the VA under chapter 37 of title 38 of the United States Code.

11. The securities issued must be modified pass-through mortgage-backed securities. These require the issuer to pay to the securities holders interest at the rate shown on the securities, scheduled principal due from the borrowers whether or not it is received by the issuer and any principal prepayments or other early recoveries of principal.

12. GNMA has guaranteed approximately $4.7 billion insecurities backed by manufactured housing loans, with approximately $4.6 billion still outstanding. Since the inception of the program, over 992,000 FHA-insured manufactured housing loans and 702,000 VA-guaranteed manufactured housing loans have been placed in GNMA-guaranteed MBS pools. This represents over 90 percent of all such loans.

13. In Georgia, possible penalties for each loan originated without compliance with the Bank Board's consumer protection requirements include (1) the payment of twice the total scheduled finance charge; (2) the payment of a fixed penalty per loan, i.e., $1,000; and (3) the forgiveness of all or a portion of the finance charge. If a significant number of loans were involved, each alternative would significantly increase the occurrence of issuer default under the GNMA MBS Program because of the depletion of the issuer's net worth. The usury finding in itself would void the FHA insurance or the VA guarantee thus rendering the loans ineligible to continue in GNMA pools. The issuer would have to buy the loans out of the pools by paying the face amount to the security holders from the issuers own funds. The loans themselves would be unsalable as they no longer carried a finance charge and were neither FHA-insured or VA guaranteed. If the issuer de-

faulted, GNMA would have to buy the loans out of the pools and terminate them prematurely.

14. When an issuer defaults, GNMA takes control of the MBS pools and assumes the responsibilities of the defaulting issuer. This includes making the required monthly payments to the security holders. GNMA attempts to sell the pools to a substitute issuer and resume its role as guarantor. However, in Georgia, GNMA's ability to sell pools would be greatly hampered, if not destroyed. It would appear probable that pools would be decimated due to the required buy out by GNMA of loans which, as has been stated, would not be saleable. GNMA would nevertheless have to pay the face amount of the loans to the security holders. Problems with a few pools could seriously affect GNMA's assets. The MBS Program could be turned from a heretofore efficient and profitable Government program into a program with significant monetary problems.

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge and belief.

/s/Louis C. Gasper
Louis C. Gasper
Executive Vice President
Government National Mortgage
Association

Subscribed and sworn to me before this 28 day of February 1985.

My commission expires April 14, 1987.

/s/Gertrude C. Brown
Notary Public

APPENDIX "H"

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

December 16, 1983

OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING FEDERAL HOUSING COMMISSIONER — TI-352

TO: ALL APPROVED TITLE I LENDING INSTITUTIONS

ATTENTION: Installed Loan Department

SUBJECT: Legislative changes covering Title I interest rates

Section 404 of the Housing and Urban-Rural Recovery Act of 1983 (Public Law 98-191) (the 1983 Act), which was signed by the President on November 39, 1983, repealed HUD's authority to establish maximum interest rates for Title I loans and provided that insured loans shall bear interest at a rate agreed upon between the borrower and the financial institution. The statutory changes was effective upon enactment.

The statutory change is mandatory and self-executing. It both removed the Secretary's statutory authority to establish a maximum rate and added statutory provisions, effective upon enactment, that directly conflict with the administrative imposition of interest rate limitations. Accordingly, the maximum interest rate provisions in the current program regulations are contrary to law and have no force.

HUD prohibitions against the charging of discount points to borrowers under Title I were an integral part of the

administered interest rate structure. The restrictions on discount points assured that borrowers were not paying an effective interest rate in excess of the established maximum interest rate. Since the clear intent of the 1983 Act is to free the interest rate in Title I transactions from administrative restrictions, continuation of such restrictions on the payment of discount points by borrowers would be inconsistent with and would frustrate that intent. Accordingly, the Department considers that its regulatory prohibitions against a Title I borrower paying discount points have been superseded by statute.

Effective immediately, therefore, lenders, sellers, and buyers may negotiate interest rate and discount point provisions which reflect the market interest rate at the time of loan approval. Borrowers also may pay a commitment fee to guarantee availability of the terms for a specific period of time. However, the current limitation of 1% on a loan origination fee for manufactured housing loans remains in effect.

If the financial requirements on borrowers are increased after loan approval but before loan disbursement, the borrower must be re-evaluated from a credit standpoint.

We believe that this major deregulatory action, enacted by Congress at HUD's request, will benefit sellers, borrowers, and lenders. We emphasize, however, that the statutory change affects only the unilateral imposition of interest rate ceilings by HUD. It does not disturb arrangements already agreed upon among sellers, borrowers, and lenders.

While the statutory change is immediate, adjustments to the market interest rate structure by parties to Title I loan transactions should occur without disruption. During the transition period, we urge all Title I lenders to continue to act consistently with expectations already created regarding transactions initiated before the statutory change.

Lenders also are cautioned to follow all applicable Federal and State disclosure requirements as well as any State or local limitations on maximum interest rates and discounts.

Sincerely,

/s/Maurice L. Barksdale
Maurice L. Barksdale
Assistant Secretary for Housing-
Federal Housing Commissioner

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING-FEDERAL HOUSING COMMISSIONER — TI-352 (Supplement)

TO: ALL APPROVED TITLE I LENDING INSTITUTIONS
Attention: Installment Loan Department

SUBJECT: Clarification of Legislative Changes Covering Title I Interest Rates

This supplemental letter is issued in response to numerous inquiries we have received on Title I letter-352 (TI-352), dated December 16, 1983, concerning the repeal of HUD's authority to establish maximum interest rates for Title I loans.

1. State Usury Laws

The last paragraph of TI-352 states that "lenders also are cautioned to follow. . .any State or local limitations on maximum interest rate and discounts." Section 404 of the Housing and Urban-Rural Recovery Act of 1983 (Public Law 98-181), which repealed HUD's authority to establish maximum interest rates for Title I loans, made *no change* in the existing law governing Federal preemption of State usury laws. Accordingly, the reference in TI-352 to State usury laws was intended as a reference only to States which have acted to override Federal preemption.

It is the responsibility of each Title I lender to determine whether States in its lending area have overridden the Federal preemption, and if so, each lender is responsible for assuring that none of its Title I loans violates State usury law limitations on the rate or amount of interest, discount points, finance charges or other charges. A loan

which violates the State usury law in a State which has overridden Federal preemption is not eligible for insurance under Title I.

More detailed information is set forth in the attachment to this letter.

2. Fixed Interest Rate

All loans must be originated at a fixed interest rate.

If you have any questions, please contract Mr. William Halpern, Director, Title I Insurance Division, Washington, DC 20410, phone (202) 755-6680.

Sincerely,

/s/Maurice L. Barksdale
Maurice L. Barksdale
Assistant Secretary

Attachment

Attachment to TI-325 Supplement

Federal Preemption of State Usury Laws

There are two pertinent provisions of Federal law which preempt State usury laws:

> Section 529 of the National Housing, 12 USC 1735f-7. This applies Federal preemption to "any loan, mortgage, or advance which is insured under Title I or II of [the National Housing] Act."
>
> Section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 USC 1735f-7 note. This applies Federal preemption with respect to loans insured by HUD which are "secured by a first lien on residential real property. . .or by a first lien on a residential manufactured home."

Both statutes permit States to override these preemption provisions. Under the Depository Institutions Deregulation and Monetary Control Act of 1980, this ability of the States to override with respect to the rate or amount of interest was limited to the period commencing on April 1, 1980 and terminating on March 31, 1983. In any case in which both preemption provisions are applicable, such as Title I manufactured home loans, the State must override both provisions. In the case of a property improvement loan which is not secured by a first lien, the Federal preemption is limited to section 529 of the National Housing Act, and therefore only it need be overridden.

In summary:

> In any State which has not acted to validly override Federal preemption of State usury laws, State law limitations on the rate or amount of interest, discount points, finance charges or other charges are not applicable.

To the extent that any State has validly overridden Federal preemption, State law limitations must be followed.

APPENDIX "I"

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING-FEDERAL HOUSING COMMISSIONER

APR 1 - 1985

Richard I. Peyster, Esq.
National Manufactured Housing
Finance Association
1575 Eye Street, N.W. Suite 350
Washington, DC 20005

Dear Mr. Peyster:

This refers to your letter of February 21, 1985 requesting clarification of HUD letter TI-352 (Supplement), dated March 2, 1984, particularly with regard to the following statement contained therein:

> In any case in which both preemption provisions are applicable, such as Title I manufactured home loans, the State must override both provisions. In the case of a property improvement loan which is not secured by a first lien, the Federal preemption is limited to section 529 of the National Housing Act, and therefore only it need be overridden.

Specifically, you have asked whether a lender, to charge an interest rate in excess of that permitted by applicable State law, must comply with §501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. §1735f-7 note, (hereinafter, the Deregulation Act), and the implementing regulations of the Federal Home Loan Bank Board published in 12 CFR 590.4, or

whether the lender need only comply with the FHA Title I manufactured home loan program regulations in 24 CFR Part 201, and thus fall within the scope of §529 of the National Housing Act, 12 U.S.C. §1735f-7.

Section 529 of the National Housing Act, which was enacted in 1979, and §501 of the Deregulation Act are similar in that they both permit interest rates on insured manufactured home loans to exceed the maximum interest rate prescribed by law in any State. The two provisions differ in that under §529 of the National Housing Act the only requirement is that a manufactured home loan must be insured (and thus in compliance with the Title I regulations), whereas under §501 of the Deregulation Act the manufactured home loan must be insured and must comply with the Federal Home Loan Bank Board's regulations cited above. The two provisions also differ with regard to State override of the Federal preemption.

The purpose of HUD letter TI-352 (Supplement) was to inform Title I lenders that although §404 of the Housing and Urban-Rural Recovery Act of 1983, P.L. 98-181, repealed the Secretary of Housing and Urban Development's authority to prescribe maximum interest rates for Title I loans, and permitted insured loans to bear whatever rate is agreed to by the lender and the borrower, §404 did not constitute a Federal preemption of State usury laws. Thus, for a Title I loan to bear an interest rate in excess of that permitted by State law (hereinafter, preemptive interest rate), property improvement lenders whose loans are secured by first liens on the improved property and manufactured home lenders may charge that rate pursuant to either §529 of the National Housing Act or §501 of the Deregulation Act; whereas property improvement lenders whose loans are secured by junior liens could charge such rate only pursuant to §529 of the National Housing Act.

It was then, and is now, this Department's interpretation of the two preemption laws that they are separate

and independent of each other, and that if a manufactured home lender can charge a preemptive interest rate pursuant to §529 of the National Housing Act it need not rely upon §501 of the Deregulation Act, and thus need not comply with 12 CFR 590.4. On the other hand, a preemptive interest rate charged pursuant to §501 of the Deregulation Act also meets the criteria for reliance upon §529 of the National Housing Act. However, if a State acts to override the Federal preemption, then lenders must ascertain whether preemption may still be available. For example, §529(b) of the National Housing Act states an override occurs if a State enacts a provision of law after the effective date of §529 which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan. There is no time limit as to when a State can take such action to override the Federal preemption. On the other hand, the ability of a State to override the §501 preemption is more circumscribed, because the State must do more than limit the rate or amount of interest, discount points, or other charges on the loan; the State must either adopt a law or certify that the voters of the State have voted in favor of a provision which states explicitly and by its terms that it does not want the provisions of §501(a)(1) to apply in that State (see §501(b)(2)). In addition, the States could only do the foregoing during a 3-year period, which expired on March 31, 1983.

Set forth below are various scenarios, based upon the foregoing discussion, which describe the rights of manufactured home lenders as a result of various State override actions:

1. a. State Action: During the above-referred 3-year period, a State enacts a law which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan, but does not explicitly and by its terms state that the provisions of §501(a)(1) of the Deregulation Act will not apply.

b. Legal Consequences: The State has overridden §529 of the National Housing Act.

c. Rights of Lenders: Title I manufactured home lenders may thereafter charge preemptive interest rates only pursuant to §501(a)(1) of the Deregulation Act.

2. a. State Action: During the 3-year period, a State enacts a law which explicitly and by its terms states that the provisions of §501(a)(1) of the Deregulation Act will not apply, but does not limit the rate or amount of interest, discount points, or other charges on a manufactured home loan.

b. Legal Consequences: The State has overridden §501(a)(1) of the Deregulation Act.

c. Rights of Lenders: Title I manufactured home lenders may thereafter charge preemptive interest rates only pursuant to §529 of the National Housing Act.

3. a. State Action: During the 3-year period, a State enacts a law which explicitly and by its terms states that the provisions of §501(a)(1) of the Deregulation Act will not apply and also limits the rate or amount of interest, discount points, or other charges on a manufactured home loan.

b. Legal Consequences: The State has overridden both sections.

c. Rights of Lenders: Title I manufactured home lenders thereafter may not charge interest rates in excess of the maximum rate authorized by State law.

4. a. State Action: After March 31, 1983 a State enacts a law which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan.

b. Legal Consequences: The State has overridden §529 of the National Housing Act.

c. Rights of Lenders: Title I manufactured home lenders may charge preemptive interest rates only pursuant to §501(a)(1) of the Deregulation Act.

We hope that the foregoing discussion clarifies the matter to your satisfaction.

Sincerely,

/s/Shirley McVay Wiseman
Shirley McVay Wiseman
General Deputy Assistant
Secretary for Housing-Federal
Housing Commissioner